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Supreme Court, U.S.
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No. 03 468 SEP 26 2003

IN THE

Supreme Court of the United States

ROY S. MOORE, in his official capacity as Chief Justice of the Alabama Supreme Court,
Petitioner,

v.

STEPHEN R. GLASSROTH,
Respondent.

ROY S. MOORE, in his official capacity as administrative head of the Alabama Judicial System,
Petitioner,

v.

MELINDA MADDOX and BEVERLY J. HOWARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's Establishment Clause jurisprudence is contrary to the Establishment Clause text of the First Amendment to the Constitution, and thus, whether *Lemon v. Kurtzman*, 403 U.S. 603 (1971), and its progeny, including the "no government endorsement test," should be overruled.

2. Whether this Court's "no government endorsement" test, as applied in this case, imposed an unconstitutional "religious test" upon Chief Justice Roy S. Moore in violation of the Free Exercise Clause as applied to the States.

3. Whether plaintiff-lawyers' claims of "offense" and "feeling" like outsiders failed the standing test of *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464 (1982).

4. Whether the Establishment Clause applies to the States only upon allegation and proof of violation of plaintiffs' liberty interest protected by the Due Process Clause of the Fourteenth Amendment, and if so, whether there was such an allegation and proof of a deprivation of constitutional liberty in this case.

5. Whether, according to the original constitutional definitions of "law," "establishment," and "religion," the monument at issue in this case is a "law respecting an establishment of religion" forbidden by the First Amendment to the United States Constitution.

6. Whether the oath and supremacy clauses of Article VI of, and the Tenth Amendment to, the Constitution preclude a federal court from enjoining Chief Justice Roy S. Moore in the discretionary performance of his state statutory and constitutional duties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alabama Chief Justice Roy S. Moore, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court for the Middle District of Alabama: (1) finding the placement of a monument, containing Ten Commandments excerpts, in the Alabama State Judicial Building to be a violation of the Establishment Clause as applied to the States, and (2) enjoining the Chief Justice from failing to remove the monument, notwithstanding the Chief Justice's oath of office to support the United States and Alabama Constitutions, and the Tenth Amendment to the United States Constitution.

OPINIONS BELOW

The United States District Court opinion finding the monument to be in violation of the Establishment Clause, as applied to the States, was entered on November 18, 2002, and is reported at 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (App. 44a). The United States District Court order and injunction requiring the Chief Justice to remove the monument was entered on December 23, 2002, and is reported at 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (App 116a). The United States Court of Appeals for the Eleventh Circuit opinion affirming the District Court's opinion and order was entered on July 1, 2003, and is reported at 335 F.3d 1282 (11th Cir. 2003) (App. 1a).

JURISDICTION

The Court of Appeals entered its decision on July 1, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Supremacy and Oath provisions of Article VI of the United States Constitution, and the Establishment and Free Exercise Clauses of the First Amendment, the Tenth Amendment, and the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. (App. 132a-33a). This case concerns also the Preamble to, the Oath provision of Article XVI, § 279 of, and § 6.10 of Amendment 328 to, the Alabama Constitution of 1901. (App. 133a-34a).

STATUTE INVOLVED

This case concerns Alabama Code § 12-3-30(a) and (b)(7). (App. 136a).

STATEMENT OF THE CASE

On January 15, 2001, following his election to the office of Chief Justice of the Alabama Supreme Court in November 2000, Chief Justice Roy S. Moore—as required by Article VI of the United States Constitution and by Article XVI, § 279 of the Alabama Constitution—swore the following oath:

> I, [Roy S. Moore], solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.

Ala. Const. of 1901, art. XVI, § 279 (App. 134a).

A. The Monument

On August 1, 2001, in accordance with his oath, and pursuant to his constitutional and statutory responsibility and authority as administrative head of the Alabama judicial department, and as lessee of the Alabama State Judicial Building, Chief Justice Moore received and placed in the rotunda area of the Alabama State Judicial Building a monument containing: excerpts from the Ten Commandments; numerous excerpts from official American government documents—including the Declaration of Independence, the Pledge of Allegiance, the Judiciary Act of 1789, and the

Preamble to the Alabama Constitution; and excerpts from English and American lawyers and statesmen—including Sir William Blackstone, James Wilson, George Washington, Thomas Jefferson, James Madison, George Mason, and John Jay. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1320-21 (M.D. Ala. 2002) (App 44a, 105a-107a).

At the August 1, 2001, dedicatory ceremony unveiling the monument, Chief Justice Moore stated that the monument "depict[s] the moral foundation of our law," and "remind[s] the ... judges ... of this state, the members of the bar ..., as well as the people of Alabama who visit the Alabama Judicial Building of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.* at 1322 (App. 108a-109a). Quoting from Justice William O. Douglas's dissenting opinion in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Chief Justice explained that the monument would serve as a reminder that "there is an authority higher than the authority of the State, that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator which government must respect." 229 F. Supp. 2d at 1322 (App. 109a).

Noting that many government officials have forgotten this "higher law" legacy—having "turned away from those absolute standards which form the basis of our morality and the moral foundation of our law"—the Chief Justice observed that our nation has "reaped the whirlwind, in our homes, in our schools and in our workplaces." *Id.* (App. 109a-110a). Recalling his campaign pledge "to restore the moral foundation of law," the Chief Justice asserted that "to restore morality, we must first recognize the source of that morality"—"the sovereign God and Creator recognized by America's forefathers, by the Pledge of Allegiance and by government officials, who have, since our nation's birth, consistently

pledged under oath, 'so help me God,' to uphold the Constitution." 229 F. Supp. 2d at 1322-23 (App. 110a).

The Chief Justice concluded his formal unveiling remarks by calling attention to the date: "[f]or it was on August 1, 1776, exactly 225 years ago today, that Samuel Adams ... delivered a speech prior to the formal signing of the Declaration of Independence ... stating, 'We have explored the temple of royalty and found that the idol that we have bowed down to has eyes which see not, ears that hear not our prayers, and a heart like the nether millstone.'" *Id.* at 1323 (App. 111a). The Chief Justice asserted that a "cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded." *Id.* at 1322-23 (App. 111a). Echoing Adams' claim that "'[w]e have this day restored the Sovereign [Who] reigns in Heaven and with a propitious eye beholds his subjects assuming that freedom of thought and dignity of self-direction which he bestowed upon them,'" the Chief Justice expressed his hope that the placement of the monument would "mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." *Id.* at 1323 (App. 111a-112a). Following these formal remarks, the Chief Justice briefed the audience on several of the official and historic references appearing on the monument's pedestal, explaining how the quoted passages "support ... the acknowledgment of the sovereignty of that God and those absolute standards upon which our laws are based." *Id.* at 1323-24 (App. 112a-114a).

Within two months after the monument's unveiling, the Chief Justice placed in the rotunda area two wall plaques: one entitled "Moral Foundation of Law," containing quotes from Martin Luther King, Jr. and Frederick Douglass, each of which referenced "the law[s] of God," 229 F. Supp. 2d at 1324-25 (App. 115a); the other, the Bill of Rights, containing the first Ten Amendments to the United States Constitution and

comporting with the "moral foundation of law" theme of the rotunda, *see id.* at 1296 (App. 52a).

B. The Law Suit

Thereafter, Plaintiff-lawyers Stephen Glassroth, Melinda Maddox, and Beverly Howard filed two separate law suits in the United States District Court for the Middle District of Alabama, seeking an injunction requiring the Chief Justice to remove only the monument, claiming that they were "offended" by the monument, which made them feel like "outsiders." 229 F. Supp. 2d at 1293, 1297-98, 1319 (App. 46a, 54a-56a, 102a). Invoking 42 U.S.C. § 1983, Plaintiff-lawyers claimed that the monument violated the Establishment Clause as applied to the States. *Id.* at 1293 (App. 46a). Assuming jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), District Court Judge Myron Thompson tried the two suits, ruling that the three Plaintiff-lawyers had standing and "that the evidence is overwhelming and the law is clear that the Chief Justice violated the Establishment Clause." *Id.* at 1293 (App. 45a).

1. Standing

The District Court rejected the Chief Justice's claim that the three Plaintiff-lawyers' "offense" was not caused by the monument, but by their disagreement with the Chief Justice's views on "separation of church and state." 229 F. Supp. 2d at 1297-98 (App. 54a-57a). Instead, the District Court concluded that the three were offended by the monument, which made them "feel" like outsiders, causing two of them to "change[] their behavior," and depriving all three of their "'use and enjoyment' of the rotunda." *Id.* at 1297 (App. 55a). The Court of Appeals affirmed that Plaintiffs Maddox and Howard had standing due to the fact that they had altered their behavior because they did not "shar[e] the Chief Justice's religious views," "consider[ed] the monument offensive," and "[felt] like outsiders." *Glassroth v. Moore*, 335 F.3d 1282, 1292

(11th Cir. 2003) (App. 21a). As for Plaintiff Glassroth, the Court of Appeals concluded that "we are not required to decide whether [he] ... who has not altered his behavior as a result of the monument, has standing." *Id.* at 1293 (App. 22a).

2. The Constitutional Text vs. Court Tests

Throughout the trial the Chief Justice maintained that the constitutionality of the monument should be measured by the constitutional text: Whether the monument constitutes a "**law** respecting an **establishment** of **religion**." While the District Court rejected on the merits the Chief Justice's contention that the monument was not a "law" (229 F. Supp. 2d at 1314-15 (App. 93a-94a)), it refused to address whether the monument respected an "establishment of religion," primarily because, in its opinion, the Chief Justice's constitutional definition of religion was contrary to modern precedent. *See* 229 F. Supp. 2d at 1313-14 (App. 90a-92a). Unwilling to ascertain a definition of religion that would conform to recent Supreme Court holdings, the District Court confessed that it "lack[ed] the expertise to formulate its own definition of religion for First Amendment purposes," and that to attempt to do so would be "dangerous" and "unwise." *See id.* at 1313 n.5, 1314 (App. 90a, 92a-93a).

Having refused the Chief Justice's invitation to adhere to the constitutional definition of religion, as propounded by James Madison and adopted by this Court, the District Court assessed the constitutionality of the monument by applying the so-called *Lemon* purpose and endorsement tests: whether the purpose of the monument was "non-secular" and whether a reasonable observer would conclude that the monument endorsed religion. 229 F. Supp. 2d at 1299-1304 (App. 58a-71a). Without any attempt to define either "religion" or "non-secular," the District Court found that the monument failed both tests because the monument acknowledged the Judeo-Christian God as the

source of the moral foundation of American law. *See id.* at 1299-1304 (App. 58a-71a).

The Court of Appeals affirmed the District Court's refusal to be governed by the text of the Establishment Clause, insisting that recent Supreme Court precedent "foreclosed" the Chief Justice's contention that the monument was neither a "law" nor "religion," and thus was not forbidden by the express terms of the Establishment Clause. 335 F.3d. at 1294-95 (App. 25a-27a). Instead, the Court of Appeals substituted this Court's *Lemon* test for the constitutional text, and without defining either "non-secular" or "religion," affirmed the District Court's finding of an impermissible "non-secular" purpose and "endorsement of religion." *Id.* at 1295-97 (App 27a-32a).

3. This Ten Commandments Case

After applying the *Lemon* test, the Court of Appeals surveyed other Ten Commandments cases, and concluded that the District Court's resolution of **this** Ten Commandments case was consistent with other lower federal court decisions striking down factually similar Ten Commandments displays, and not inconsistent with factually dissimilar displays that have been upheld. 335 F.3d at 1298-1301 (App. 34a-39a). Indeed, the District Court prefaced its opinion with the "announce[ment] [that it] does not hold that it is improper in all instances to display the Ten Commandments in government buildings; nor does [it] hold that the Ten Commandments are not important, if not one of the most important, sources of American law." 229 F. Supp. 2d at 1293 (App. 45a). The court even acknowledged that the evidence in this case established that "the first tablet" of the Ten Commandments "has secular aspects," as "the Chief Justice pointed out in his speech unveiling the monument in his reference to Samuel Adams's "referring to the King as a false idol, alluding to the Commandment that 'Thou shalt have no other Gods before me.'" *Id.* at 1300 App. 60a). Nevertheless, the District Court found "that the Chief Justice's actions and

intentions in this case crossed the Establishment Clause line between the permissible and the impermissible." *Id.* at 1293 (App. 45a-46a).

In examining the "actions and intentions" of the Chief Justice, the District Court did not conduct a "deferential and limited"[1] review of the Chief Justice's official actions and statements in relation to the placement of the monument. Instead, the court engaged in a wide-ranging survey of the Chief Justice's personal religious views and professional legal opinions, including the Chief Justice's views of the Establishment Clause as set forth in a law review article published years before he became Chief Justice (*see id.* at 1311, 1312-13 (App. 85a, 88a-98a)), and the Chief Justice's views of the relationship between church and state as stated in a dissenting opinion in a case before the Alabama Supreme Court. *See id.* at 1309 (App. 80a-82a). After this intrusive odyssey through the mind and heart of the Chief Justice, the court emerged to apply the "purpose" prong of the *Lemon* test without distinguishing between the Chief Justice's "purpose" and "motive" "because of the extent to which the Chief Justice's religious views control his understanding of the structure of government." *Id.* at 1316 n.6 (App. 96a). Thus, in reaching the conclusion that the purpose of the monument was "non-secular," the District Court examined the monument, and the Chief Justice's official actions thereto, through the prism of the Chief Justice's general religious and legal philosophy, rather than by reference to the texts on the monument or to the Chief Justice's actual statements and actions taken in relation thereto. Thus, the District Court's finding that the monument's purpose was impermissibly religious was inextricably intertwined with its finding that the Chief Justice's personal and legal views, insofar as they informed his official actions,

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[1] *See Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring).

were constitutionally impermissible. *See id.* at 1299-1301 (App. 58a-64a).

The Court of Appeals deferred to these District Court findings, maintaining that "the purpose inquiry is a factual one ..., and on appeal we are obligated to accept the district court's findings of fact unless they are clearly erroneous." 335 F.3d at 1296-97 (App. 30a). Indeed, the Court of Appeals prefaced its entire opinion with the explanation that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Id.* at 1288 (App. 13a). Thus, the Court of Appeals, like the District Court, made no effort to limit its inquiry into the actual purpose of the monument, as reflected by the monument itself and the Chief Justice's official action thereto, but rather relied upon the District Court's probe into the Chief Justice's religious and legal views and attributed them to the monument. *See id.* at 1286-87 (App. 8a-10a).

4. The Chief Justice's Oath

Having made the Chief Justice's personal religious and legal views their constitutional litmus test, both the District Court and the Court of Appeals highlighted the conflict between the District Court's injunction and the Chief Justice's oath to support the United States and Alabama constitutions. Initially, this conflict was averted by the District Court's decision to decline to "enter an injunction requiring Chief Justice Moore to remove his Ten Commandments monument forthwith," preferring instead to enter a declaratory judgment that the monument violated the Establishment Clause as applied to the States. 229 F. Supp. 2d at 1319 (App. 102a-103a). When the Chief Justice did not voluntarily remove the monument, the District Court issued an injunction directing the Chief Justice to remove the monument. 242 F. Supp. 2d at 1067 (App. 116a). With the issuance of the injunction, the Chief Justice was faced with the choice of either conforming his official

conduct to the District Court's order or to his oath to support the First Amendment to the United States Constitution, and to the Preamble to the Alabama Constitution. This conflict was again averted by the District Court's grant of a stay of the injunction pending the Chief Justice's appeal to the Court of Appeals. *Glassroth v. Moore*, 242 F. Supp. 2d 1068 (M.D. Ala. 2002) (App. 118a).

The Court of Appeals summarily dismissed the Chief Justice's claim that the District Court's injunction required him to violate his oath of office as being no different from "the ... position taken by those southern governors who attempted to defy federal court orders during an earlier era." 335 F.3d at 1302 (App. 42a). Not only did the Court of Appeals consider the Chief Justice's claim to be contrary to judicial precedent and Article III, § 1 and Article VI, cl. 2 of the United States Constitution, but a direct threat to the rule of law:

> The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

335 F.3d at 1303 (App. 43a).

5. The Case on Remand to the District Court

Upon remand, and notwithstanding the Chief Justice's objection, on August 5, 2003, the District Court "lifted and dissolved" its December 23, 2002 stay, reinstated its December 19, 2002 order to "enjoin and restrain" the Chief Justice "from failing to remove ... the Ten Commandments monument, and set a new date—August 20, 2003—for the monument to be

removed "from the non-private areas of the Alabama State Judicial building." *Glassroth v. Moore*, No. 01-T-1268-N, slip op. at 5 (M.D. Ala. Aug. 5, 2003) (App. 127a). Consistent with the Chief Justice's testimony prior to the issuance of the December 23, 2002 injunction that he could not obey the order and, at the same time, be true to his oath of office, the Chief Justice declined to remove the monument.[2]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS CONSTITUTIONAL ISSUES THAT THIS COURT MUST ADDRESS.

There are compelling reasons why this Petition should be granted. First, this Court has failed to discharge its duty to provide a uniform rule of law governing Establishment Clause cases, as required by Articles III and VI of the United States Constitution. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). Second, because this Court has failed to conform its Establishment Clause jurisprudence to the Constitution, it has led to a misuse of the power of judicial review, which presupposes that judges will be faithful to their oaths to submit to the written constitution as their "rule of government." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

Even though several members of this Court over the past twenty-three years have found this Court's Establishment Clause jurisprudence to be seriously deficient, the Court has failed to provide a remedy. As a consequence of this failure,

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[2] Although not parties to the case, the District Court's final judgment and injunction were served on the eight Associate Judges of the Alabama Supreme Court. On August 27, 2003, "pursuant to their obligation to comply, the eight Associate Justices ordered the building manager to remove the monument." *McGinley v. Houston*, No. 03-T-0895-N, slip op. at 5, 2003 WL 22150719 (M.D. Ala. Sept. 04, 2003). Thus, as of the filing date of this Petition, the monument is situated in a closet behind locked doors in the State Judicial Building. *See id.*

the lower federal courts are floundering in a sea of precedents with no legal rudder. As the Court of Appeals below observed, "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." 335 F. 3d at 1288 (App. 13a). Thus, the Court of Appeals concluded that because "factual specifics and context are everything when it comes to applying the Establishment Clause to religious symbols and displays" (*id.* at 1300 (App. 38a)), it was required by its "clear error" rule to defer to the District Court's findings of fact. *See id.* at 1291 (App. 19a). In so doing, the Court of Appeals has dramatically revealed that, under this Court's prevailing *Lemon* test, Establishment Clause cases turn not on careful appellate review of the application of legal norms, but on the fact-finding discretion of trial judges. Rulings in Establishment Clause cases, then, turn not on a uniform rule of law. It is time, therefore, for this Court to seriously reexamine *Lemon v. Kurtzman*, 403 U.S. 603 (1971), and its progeny.

The failure to provide a clear rule governing the Establishment Clause has not deterred lower federal courts from issuing injunctions requiring government officials to conform their conduct to their constitutional interpretations. Thus, even though the Court of Appeals below recognized that this case was not decided by a "bright-line rule," but upon a trial court's fact-finding discretion, it still proclaimed that "the rule of law" requires the highest judicial officer of a state to put aside his oath of office to support the Constitution of the United States and the Constitution of his state, and obey a district court's injunction, unless reversed by a higher court. *See* 335 F. 3d at 1303 (App. 43a). According to Article VI of the United States Constitution, State officers—judicial, executive, and legislative—take the same oath of office to support the United States Constitution as do federal judges. In so doing, state officers swear allegiance to "[t]his Constitution ... as the supreme law of the land," not allegiance to the

federal judiciary. It has been commonly assumed, however, that judicial precedent controls the Constitution. This assumption is not true. As Chief Justice Marshall asserted in *Marbury v. Madison*, a federal judge takes an oath to decide cases "agreeably to the constitution," not agreeably to judicial precedent. *See* Marbury, 5 U.S. at 180. Furthermore, in the exercise of the power of judicial review, the federal courts are subject to the checks and balances of the judicial, executive and legislative officers of the fifty independent and sovereign states, as well as by Congress and the President. As is true of the President and Congress, who cannot be enjoined by the federal courts to perform their discretionary duties of office (*see Franklin v. Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality)), no state chief justice, governor, or legislature may be so enjoined. To rule otherwise is to establish rule by judges, not the rule of law.

In this 200th anniversary year of *Marbury v. Madison*, this case presents a unique opportunity to affirm that this Court's actions—like the actions of the President, Congress, and state officials—are governed by the express words of the Constitution, itself. Indeed, this case presents to this Court an obligation to revisit its precedents to ascertain if they comply with the rule of the Constitution. If this Court fails to review this case, it would send a clear signal that the federal judiciary is above the Constitution, undermining the very foundation of judicial review recognized in *Marbury*: That a judge must be true to his sworn oath of office to decide each case "agreeably to the constitution of the United States." 5 U.S. at 180.

II. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE IS BANKRUPT.

As Justice Souter has recently observed, this Court's Establishment Clause jurisprudence has reached "doctrinal bankruptcy." *Zelman v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J, dissenting). Seven years earlier, Justice

Thomas came to a similar conclusion, stating that this Court's "Establishment Clause jurisprudence is in hopeless disarray." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Two years before that, Justice Scalia joined his voice with a chorus of academic critics that this Court's "Establishment Clause [cases constitute a] geometry of crooked lines and wavering shapes." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). And thirteen years previously, Justice Stevens bemoaned the fact that this Court's Establishment Clause precedents have presented to the courts "the sisyphean task of trying to patch together 'the blurred, indistinct and variable barrier' described in *Lemon*," this Court's leading Establishment Clause precedent. *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

Rather than address a failed Establishment Clause jurisprudence, this Court has justified it, explaining that "it 'sacrifices clarity and predictability for flexibility.'" *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (quoting *Committee for Public Educ.*, 444 U.S. at 662). As Professor Jesse Choper has written, however, this explanation is a "euphemism ... for... the absence of any principled rationale." J. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 680-81 (1980). As this case demonstrates, it is time to overrule *Lemon*, and return to the Establishment Clause text.

A. The *Lemon* Test Is Not A Rule Of Law.

The Court of Appeals below asserted that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." 335 F.3d at 1288 (App. 13a). Thus, the Court of Appeals' review of the District Court's decision was fact-oriented and limited to a "review [of the] District Court['s] fact findings

only for clear error." *Id.* at 1291 (App. 19a). While such deference to a trial court's findings of fact provides maximum "flexibility," such flexing of judicial discretion has fractured the Establishment Clause that this Court is sworn to support.

First, such invertebrate adjudication provides an altogether too convenient way to reconcile all Establishment Clause decisions without the guidance of a uniform rule. All a court need do is find some factual difference, and every Establishment Clause case may be reconciled with every other one, even when the subject is the same, such as public displays of the Ten Commandments on government property. *See id.* at 1298-1301 (App. 34a-40a).

Second, ad hoc decision-making excuses this Court from having to exercise its supervisory power over conflicting decisions of the United States Courts of Appeals. *See* Sup. Ct. Rule 10(a). According to this Court's Establishment Clause "flexibility" policy, as applied by the Court of Appeals below, there would never arise a case where a Ten Commandments display case would merit review by this Court on the ground that the Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." There can simply be no conflict if each Ten Commandments display case can be factually distinguished from every other one. Indeed, in light of recent decisions denying certiorari in Ten Commandments cases, it appears that this Court is sending a signal to the lower courts that they may resolve these cases at their discretion. *See, e.g., Elkhart v. Books*, 532 U.S. 1058 (2001). Thus, in the Establishment Clause arena the Constitution is not the supreme law of the **land**, but varies circuit to circuit, and district to district, depending on the specific facts and circumstances of each case as determined by individual judges.

Third, this Court's Establishment Clause "flexibility" policy covers up a legal void recognized by numerous courts of

appeal and district judges. As the Fifth Circuit Court of Appeals observed in *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000), this Court's Establishment Clause jurisprudence is a "vast, perplexing desert."[3] The United States Court of Appeals for the Fourth Circuit recently chafed at having to "venture into the often-dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999). *See also Smith v. Blue Valley Unified Sch. Dist.*, 1989 WL 42652, *4 (D. Kan. 1989). The United States Court of Appeals for the Tenth Circuit likewise shuddered upon entry into the Establishment Clause thicket "due to the inherent difficulty of attempting to discern an individual's unexpressed or psychological motive, [which] exacerbate[s] what is already perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561 (10th Cir. 1997). *See also First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1174 (D. Utah 2001), *rev'd*, 308 F.3d 1114 (10th Cir. 2002) ("Establishment Clause case law is notoriously confused and difficult").

Such observations are especially applicable to the so-called "religious display" cases. Recently, the Third Circuit applied this Court's "murky" *Lemon* test, to resolve an Establishment Clause challenge to a seventy-year-old Ten Commandments plaque, placing great emphasis on the facts, including the location of the plaque away from the main entrance to a county courthouse. *Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 261-62 (3rd Cir. 2003). The Third Circuit's emphasis upon the unique facts in Chester County

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[3] This Court acknowledged that "the case's tortuous history ... indicates well the degree to which our Establishment Clause jurisprudence has shifted ... while nevertheless retaining anomalies with which the lower courts have had to struggle." *Mitchell v. Helms*, 530 U.S. 793, 804 (2000).

parallel the conclusions of the Court of Appeals below "that factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays." *Glassroth*, 335 F.3d at 1300 (App. 38a). As the Third Circuit Court of Appeals has observed: "The uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). No wonder, Justice Scalia has confessed that "it is a sufficient embarrassment that [this Court's] Establishment Clause jurisprudence regarding holiday displays ... has come to 'require scrutiny more commonly associated with interior decorators than with the judiciary.'" *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

By its assertion that "factual specifics and context are nearly everything when it comes to applying the Establishment Clause," the Court of Appeals below dispensed with any notion that it had to give any principled reason for distinguishing one case from another. *See* 335 F.3d at 1300-01 (App. 38a-40a). Thus, the Court of Appeals below has chosen the same path as the Court of Appeals for the Fifth Circuit which has "eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because ... a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993).

B. The *Lemon* Test Undermines The Rule Of Law.

Even when the lower federal courts have attempted to apply a legal test to resolve an Establishment Clause case, they have found a "cherry-picking" array of choices. In *Stone v.*

Graham, 449 U.S. 39 (1980), this Court applied the original formulation of the "three-part" *Lemon* test to assess the constitutionality of a Ten Commandments display.[4] While the *Lemon* test appears to be the test of choice in Ten Commandments display cases, as it was in the courts below (335 F.3d at 1295-97 (App. 27a-32a); 229 F. Supp. 2d at 1299-1301 (App. 58a-64a)), it is uncertain whether the classic *Lemon* test as applied by this Court in *Stone* is the *Lemon* test of today's Court. In *Agostini v. Felton*, a majority ruled that the third prong—concerning "excessive entanglement"—has been merged into the second prong which, itself, had previously been transformed into a "no government endorsement of religion" test. *See Agostini v. Felton*, 521 U.S. 203 (1997). Some courts of appeals, including the Court of Appeals below, have paid no attention to this metamorphosis, preferring the original *Lemon* test. *See Glassroth*, 335 F.3d at 1295-96 (App. 27a-28a). *See also Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003). The Court of Appeals for the Third Circuit, however, has even modified this Court's two-step *Lemon* test, reducing it to one: whether a Ten Commandments display constitutes an endorsement of religion. *See Freethought Soc. of Phila.*, 334 F.3d at 258. In effect, so has the Court of Appeals below, giving lip-service to the classic three-part *Lemon* test, but conducting plenary review only of the "endorsement" prong. 335 F.3d at 1297 (App. 31a-32a).

In addition to fostering this revisionist impulse by criticism of the *Lemon* test (*see Lee v. Weisman*, 505 U.S. at 644 (Scalia, J., dissenting)), this Court has opened the door to disregarding the *Lemon* test altogether. In *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court discarded the *Lemon* test, in order to

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[4] *Stone* has become the touchstone of all Ten Commandment display cases, as it was in the Court of Appeals below. *See* 335 F.3d at 1295 (App. 27a, 30a). Yet, as Justice Rehnquist stated in his dissent, *Stone* was decided without full briefing on the merits and oral argument. 449 U.S. at 47.

uphold the constitutionality of legislative chaplaincies. One year later, this Court forthrightly stated its "unwillingness to be confined to any single" test in the Establishment Clause area. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). As a consequence, it has left the lower federal courts at large, not only as to the **kind** of *Lemon* test to be applied, but whether to apply *Lemon* at all. Both of the courts below refused Chief Justice Moore's invitation to follow *Marsh*, rather than *Lemon*, primarily because the Chief Justice could not demonstrate that the Ten Commandments displays were on an exact historical parallel with legislative chaplaincies. *See* 335 F.3d at 1297-98 (App. 32a-34a); 229 F. Supp. 2d at 1305-08 (App. 72a-79a). While this Court has warned against too broad a reading of *Marsh*, this Court has utterly failed to provide the lower federal courts with any principled guideposts governing its application. *See, e.g., ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300-01 (6th Cir. 2001). Truly, as Justice Scalia has noted, the *Lemon* test, although much maligned and modified, has survived because it is a convenient tool "invoke[d]" by the courts "[w]hen [they] wish to strike down a practice it forbids." *Lamb's Chapel*, 508 U.S. at 399.

C. The No Endorsement Test Violates Free Exercise.

Adherence to the "no government endorsement" variation of the *Lemon* test has invited a slew of cases challenging Ten Commandments monuments on the sole ground that a plaintiff is offended by the monument, made to feel like a second-class citizen, and who has changed his behavior, however slightly, as a consequence of having taken offense. *See County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). By rote repetition of this legal mantra, plaintiffs have gained access to a federal court to stop government actions with which they disagree, despite this Court's ruling that no person has standing to litigate an Establishment Clause claim simply because he has suffered a "psychological" injury "produced by observation of conduct with which one

disagrees." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

According to the Court of Appeals below, the Plaintiffs in this case—all lawyers—were "offended," made to "feel like outsiders," and, as a consequence, two of the three "altered their behavior" because of "the wound ... inflicted [upon them] by the monument itself," not because they disagreed with the Chief Justice's "views about religion and government." *Glassroth*, 335 F.3d at 1293 (App. 22a). But, in another part of its opinion, the Court of Appeals found the monument was inseparable from the Chief Justice's views! Since the monument was so inseparable from the Chief Justice's religious views, it is impossible for anyone to conclude that any one of the three Plaintiff-lawyers' claimed offense and hurt feelings were the consequence of anything other than the observation of the Chief Justice's "religious views" with which each disagrees. *See* 335 F.3d at 1292-93 (App. 20a-23a).

By sustaining the Plaintiffs' standing in this case, then, the Court of Appeals has enabled Plaintiffs to parlay their hurt "feelings" into judicial imposition of second-class citizenship upon Chief Justice Moore because he has "religious views" of law and government. After all, had the Chief Justice had "secular" views of how justice should be administered, and pursuant thereto had erected a monument dedicated to the works of Oliver Wendell Holmes, no plaintiff could have sustained access to a federal court even if they were "offended" and made to "feel like outsiders" by Holmes' legal positivist views. Thus, by affirming Plaintiff-lawyers' standing in this case and finding that the Chief Justice has "endorsed" a theistic view of the moral foundation of law, the Court of Appeals has effectually imposed a "religious test" upon Chief Justice Moore. After all, if the Chief Justice held to a more pluralistic view, erecting a monument that identified God as only one of many sources of law, the District Court would apparently have

found the monument to have a secular purpose and to not be an "endorsement of religion," and the Court of Appeals would have affirmed. *See* 229 F. Supp. 2d at 1299 (App. 58a-60a); 335 F.3d at 1296-97 (App. 28a-32a).

Warning against such misuse of the Establishment Clause, Justice Brennan opined that under the Free Exercise Clause:

> Government may **not** inquire into the religious beliefs and motivations of officeholders—it may **not** ... question whether their ... actions stem from religious conviction.... In short, government may **not** as a goal promote "safe thinking" with respect to religion and fence out from political participation those ... whom it regards as overinvolved in religion.... The Establishment Clause ... may **not** be used as a **sword** to justify repression of religion or its adherents from any aspect of public life.

McDaniel v. Paty, 435 U.S. 618, 641-42 (1978) (Brennan, J., concurring in the judgment) (emphasis added).

D. The *Lemon* Test Undermines The Tenth Amendment.

When applied to the actions of state officials, the "no endorsement" test not only misapplies the First Amendment's prohibition against laws respecting establishments of religion, but unconstitutionally intrudes upon the Tenth Amendment. As Justice Thomas has recently written, the Establishment Clause was originally written to preserve to the states "greater latitude in dealing with matters of religion." *Zelman*, 536 U.S. at 680 (Thomas, J., concurring). Such latitude is evidenced in the preambles of almost all of the fifty state constitutions, including Alabama's preamble which invokes the favor and guidance of Almighty God in the formation of its civil government and in the administration of justice. *See* C. Millard, *The Christian Heritage of the 50 United States of America* (2000). To deny to the highest judicial officer of Alabama, under the guise of the Establishment Clause, the discretion to

place a monument acknowledging God as the moral foundation of law is to turn that Clause on its head. As Justice Thomas has pointed out in his *Zelman* concurrence, there is nothing in the Fourteenth Amendment that changes the original state protective design of the Establishment Clause unless there is evidence that the state official's legislative action has impaired the "liberty" interest of a person in contravention of the Due Process Clause. 536 U.S. at 697.

E. The *Lemon* Test Violates The Establishment Clause.

As an antidote to a diseased Establishment Clause jurisprudence, Chief Justice Moore prescribed **not** another test, but the healing remedy of the constitutional text. Reminding the courts below that the first rule of constitutional interpretation is to attend to the meaning of each word of the text (*see Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840)), the Chief Justice contended that the monument was not "a law respecting an establishment of religion." He maintained that the monument was not a "law" because it prescribed no "rule of civil conduct commanding what is right and prohibiting what is wrong." *See* I W. Blackstone, *Commentaries on the Laws of England* 44 (Univ. of Chi. Facs. ed. 1765). Rather, the Chief Justice maintained that the monument was simply a "decorative reminder of the moral foundation of law." *Glassroth*, 335 F.3d at 1294. Second, the Chief Justice relied on the original definition of religion as set forth in Art. I, § 16 of the Virginia Constitution and James Madison's 1785 *Memorial and Remonstrance*, and as embraced by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878), *Davis v. Beason*, 133 U.S. 333 (1890), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and as confirmed in *Torcaso v. Watkins*, 367 U.S 488, 492 n.7 (1961). Chief Justice Moore claimed that the monument did not respect "an establishment of religion" in that it did not concern those duties owed exclusively to the Creator, enforceable by reason and conviction. Rather, the Chief Justice stated that the monument

presented the Ten Commandments as the moral foundation of the law of civil society, including the law of freedom of religion and limited civil government as reflected in the first table of the Ten Commandments. Thus, the Chief Justice confirmed that the monument was not an unconstitutional "law" respecting an establishment of "religion."

The District Court rejected the Chief Justice's proof that the monument did not respect "religion," not because it found the proffered definition unsupported by the constitutional text and history, but because it found the definition "dangerous" and "unwise," leading to results that it could not countenance. 229 F. Supp. 2d at 1313 n.5 (App. 90a). Candidly admitting that it could offer no alternative definition of religion—"lack[ing] the expertise" to do so—the District Court rejected the original, and only, constitutional definition ever embraced by this Court—on the ground that the constitutional definition conflicts with modern Establishment Clause decisions of this Court. *Id.* at 1313-14 (App. 90a-92a).

The Court of Appeals, likewise, rejected the constitutional definition of religion on the sole ground that it "is inconsistent with the Supreme Court's because [it] presupposes a belief in God," 335 F.3d at 1295 (App. 26a), which itself is inconsistent with this Court's acknowledgment that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Court of Appeals cited no Supreme Court case where this Court has repudiated its endorsement of the theistic definition of religion as embraced by James Madison's *Memorial and Remonstrance*.[5] To the contrary, several justices on this Court

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[5] Quoting verbatim the 1776 Virginia Bill of Rights, Madison stated that "religion" is "the duty that we owe to our Creator" when "the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Thus, he concluded that any person who fails to discharge such a duty is answerable only to God, not men. By this theistic definition of religion, Madison was able to determine those duties subject solely to

have referred to Madison's theistic definition of religion in his *Memorial and Remonstrance* as the source of their understanding of "the individual freedom of conscience protected by the First Amendment." *See Wallace v. Jaffree*, 472 U.S. 38, 53 n.38 (1985). *Accord Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring in the judgment). Additionally, in numerous cases, this Court has explored Madison's *Memorial and Remonstrance*, and other 18th-Century sources, to ascertain the meaning and application of the Establishment and Free Exercise Clauses. *See, e.g., Lee*, 505 U.S. at 590-608, 612-15, 621-27, 633-36, 640-42. Indeed, as evidenced by Justices Scalia's and O'Connor's recent debate over the Free Exercise ruling in *Employment Div. v. Smith*, 494 U.S. 872 (1990), Madison's theistic definition of religion has continued to play a leading role in this Court's Free Exercise jurisprudence. *See City of Boerne v. Flores*, 521 U.S. 507, 541-42, 560-61 (1997). That definition should prevail in this Court's Establishment Clause jurisprudence, for the very text of the First Amendment demands only "one definition of religion:"

> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment," and another, much broader, for securing "the free exercise thereof."

Everson, 330 U.S. at 32 (Rutledge, J., dissenting).

Likewise, there is no reason for this Court to disregard the clear language that the Establishment Clause applies only to a "law" respecting an establishment of religion. Even this Court has recently acknowledged that the Establishment Clause is

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individual conscience. J. Madison, *Memorial and Remonstrance*, reprinted with approval in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-64 (1947).

directed at the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Yet, in "religious display" cases, this Court has, in effect, amended the Establishment Clause, by ruling that the Clause may be violated by either a "statute or practice." *See County of Allegheny*, 492 U.S. at 592.

III. CHIEF JUSTICE MOORE'S OATH IS TO THE CONSTITUTION, NOT THE FEDERAL COURTS.

In recent years, courts have assumed that this Court's precedents prevail over the Constitution as the supreme law of the land. Thus, relying solely on court precedents, the Court of Appeals below rejected the Chief Justice's contention that, because of his oath of office, the District Court had no jurisdiction to enjoin him to remove the monument. *Glassroth*, 335 F.3d at 1302 (App. 42a). Furthermore, the Court of Appeals ruled that "the rule of law" demands that—no matter how erroneous—the Chief Justice must obey the District Court order unless the order is "overturned through the usual appellate processes." *Id.* at 1303 (App. 43a). The Court of Appeals is mistaken.

A. The Chief Justice Cannot Be Enjoined To Act Contrary To His Oath.

For 200 years, federal courts have been exercising the power of judicial review in reliance upon this Court's decision in *Marbury v. Madison*. Today, even critics of the exercise of this power assume that *Marbury* established that the federal courts are above the Constitution, and that the Constitution is what the judges say it is.[6] This is not true. Twice, in *Marbury*, Chief Justice John Marshall stated just the opposite. After taking note of the declaration in Article VI that "[t]his

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[6] *See, e.g.*, D. Limbaugh, *A Clashing of Principles and Jurisdictions*, NewsMax.com (Aug. 22, 2003), *available at* http://www.newsmax.com/archives/articles/2003/8/21/214913.shtml.

Constitution ... shall be the Supreme Law of the Land," Chief Justice Marshall wrote:

> [T]his particular phraseology ... confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and *courts* as well as other departments, are bound by that instrument.

5 U.S. at 180. After a review of several constitution provisions directly related to the exercise of power by the courts, Chief Justice Marshall concluded:

> From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* .... Why otherwise does it direct judges to take an oath to support it?

Id. at 179-80.

For Chief Justice Marshall, the swearing of an oath to support the constitution was especially important:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?

Id. at 180. Indeed, Chief Justice Marshall concluded that it would be "immoral" to require a judge to perform his judicial duties in a manner that would violate that judge's oath:

> This oath certainly applies, in an especial manner, to their [judges'] conduct in their official character. How immoral to impose it upon them, if they were to be used as knowing instruments, for violating what they swear to support?

Id.

By ruling that Chief Justice Moore's oath to support the United States and Alabama Constitutions was no defense to a

federal court injunction requiring him to perform his official duties contrary to his oath, the Court of Appeals below transformed the Chief Justice's oath from an oath to support the constitution as the rule governing his official actions to an oath to support the federal judiciary as the rule governing such actions. Such a claim of judicial supremacy over the Chief Justice's oath does not serve "the rule of law," as the Court of Appeals claimed, but the rule of judges. As such, it is a species of judicial idolatry,"[7] suitable, perhaps, for the British monarchy, but not for the American constitutional republic.

In the British Commonwealth, officers of the government swear an oath of allegiance to the king or queen, pledging "faithful and ... true allegiance to [his or her] Majesty ...." Promissory Oaths Act 1868, Ch. 72, § 2 (Eng.). The oath of allegiance to the British monarchy is in the nature of an oath of fealty to another human being who stands in the position of lord, whereas the oath of allegiance to the Constitution is an oath of faithfulness to the **law** that governs a person who has civil power. As Chief Justice John Marshall put it in *Marbury*, a federal judge's oath to decide cases "agreeably to the Constitution," presupposes that the Constitution—as it is written, not as it is interpreted by judges—is the rule of government even for the Supreme Court. 5 U.S. at 180. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting).

B. The Chief Justice's Oath Serves As A Check And Balance On Federal Judicial Power.

As pointed out by James Madison in *Federalist* No. 51, a system of separation of powers, accompanied by external checks and balances, is the first essential to establish and maintain the rule of law. Indeed, as Madison observed, the

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[7] *See* Bowman, *Congress and the Supreme Court*, 25 Pol. Sci. Q. 20, 34 (1910).

very nature of man requires that those who exercise civil power at the national level must not only be independent from one another, but subject to "encroachments" by the other co-equal branches in order to "control the abuses of government." *Id.* Additionally, Madison asserted that a second essential of division of power between "two distinct governments," one central and another local, would provide "double security ... to the rights of the people," through a system of state checks and balances upon the central government. *Id.* By creating this "compound republic" for America's civil government, Madison concluded that no one branch of government would come into monopoly power, and thereby, the American people would be protected from despotism.

Those who claim that the federal judiciary need only be governed by their own sense of "self-restraint"[8]—not only stand four-square against Madison's description of the nature of the American constitutional republic, but suffer from "blind hubris" that an unchecked federal judiciary is no threat to the rule of law because it is insulated from politics by the constitutional system of lifetime appointments. *See The End of Democracy? The Judicial Usurpation of Politics*, First Things 18-20 (Nov. 1996). Those who designed the system of appointed federal judges, holding their offices during "good behavior," did not contemplate a judiciary held in check only by the power of impeachment. Rather, as Alexander Hamilton wrote in *Federalist* No. 78, the federal judiciary would be checked, at least, by both the executive and legislative branches of the federal government.

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[8] *See, e.g.*, Chief Justice Harlan Fiske Stone's claim in *United States v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting), that "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

According to *Federalist* No. 78, a court order is not self-executing, but "ultimately depend[ent] upon the aid of the executive arm even for the efficacy of its judgments." And so it is according to Article II, § 3, which states that it is the duty of the President "to take care that the laws be faithfully executed." Thus, if a court order is contrary to the law of the Constitution, it is the President's duty to decline to enforce such an order. If he does not, then he has failed to honor his oath of office to "preserve, protect, and defend the Constitution of the United States." Recently, however, presidents have been so compliant that some federal courts have even forgotten this Court's rulings that the President is not personally amenable to federal court jurisdiction in matters concerning the performance of his official duties. *See Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality). This salutary rule is, as Justice Scalia noted, necessary to preserve the constitutional structure of separation of powers, and its concomitant system of checks and balances. *Id.* at 826-29 (Scalia, J., concurring). Hence, law suits brought to test the constitutionality of the exercise of federal executive power name as parties defendant persons of cabinet rank whose duties are ministerial (*see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), thereby preserving the President's independence to act according to his constitutional oath. *See Franklin*, 505 U.S. at 828 (Scalia, J., concurring).

This rule limiting the jurisdiction of the federal courts is equally applicable to state officials who have taken a similar oath "to support this Constitution." As Madison noted in *Federalist* No. 51, the distribution of power between the United States government and the governments of the several states was designed to provide a check upon the centralization of power. Nowhere is this federalist principle more evident than in the original purpose of the Establishment Clause. From the beginning, it has been the role of the several states, not the United States, to foster the virtues thought necessary to

establish and preserve a self-governing people. Accordingly, the 1776 Virginia Declaration of Rights declared "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." *Constitution of Virginia, Bill of Rights* (June 12, 1776), reprinted in *Sources of Our Liberties* 313 (Perry rev. ed., Amer. Bar Found. ed. 1978). Furthermore, from the beginning, America's founders understood that the fostering of moral excellence was a task intimately tied to religious teaching. As George Washington put it in his Farewell address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." G. Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (W. B. Allen ed. 1988).

When Chief Justice Moore placed the monument containing excerpts from the Ten Commandments in the rotunda of the Alabama State Judicial building, he was truly following the tradition of the founders to acknowledge God as the source of the community morality so essential to a self-governing society. By enjoining the Chief Justice to remove the monument, the courts below have compromised the highest judicial officer of the state of Alabama, requiring him to violate his oath of office or risk being held in contempt of court. This is a blatant misuse of federal judicial power, taken in disregard of the Chief Justice's role in our federal system to preserve the rule of law by serving as a check and balance against the issuance of unlawful orders.

CONCLUSION

For the reasons stated, Chief Justice Moore's petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 26, 2003

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OPINIONS AND ORDERS BELOW

335 F.3d 1282 (11th Cir. 2003)

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Stephen R. GLASSROTH, Beverly J. Howard, Plaintiffs-Appellees,
v.
Roy S. MOORE, Chief Justice of the Alabama Supreme Court, Defendant-Appellant.

Melinda Maddox, Plaintiff-Appellee,
v.
Roy S. Moore, in his official capacity as Administrative Head of the Alabama
Judicial System, Defendant-Appellant.

Nos. 02-16708, 02-16949.

July 1, 2003.

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Appeals from the United States District Court for the Middle District of Alabama.

Before EDMONDSON, Chief Judge, CARNES, Circuit Judge, and STORY,* District Judge.

CARNES, Circuit Judge:

[*1] The Chief Justice of the Alabama Supreme Court installed a two-and-one- half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo- Christian God over both the state and the church. And he rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." *Glassroth v. Moore,* 229 F.Supp.2d 1290, 1297 (M.D.Ala.2002).

The monument and its placement in the rotunda create the impression of being in the presence of something holy and sacred, causing some building employees and visitors to consider the monument an appropriate and inviting place for prayer. Three attorneys who do not consider the monument appropriate at all and who do not share the Chief Justice's religious beliefs brought two separate lawsuits to have the monument taken out. Agreeing with them that it violated the Establishment Clause of the First Amendment, the district court ordered the monument removed. *Glassroth,* 229 F.Supp.2d at 1319; *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). The Chief Justice appealed. We affirm.

* Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

I.

Because "[i]n religious-symbols cases, context is the touchstone," *King v. Richmond County*, 331 F.3d 1271, 1282, slip op. at 2552 (11th Cir.2003), we set out the relevant facts in some detail, most of which are pulled from the district court's opinion, but a few of which we have drawn from undisputed testimony or other evidence in the record.

Chief Justice Moore began his judicial career as a judge on the Circuit Court of Etowah County, Alabama. After taking office he hung a hand-carved, wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing sessions. Those actions generated two high-profile lawsuits in 1995 based on the Establishment Clause, one filed by a nonprofit organization seeking an injunction and the other brought by the State of Alabama seeking a declaratory judgment that then- Judge Moore's actions were not unconstitutional. Both suits were dismissed on justiciability grounds. *Ala. Freethought Ass'n v. Moore*, 893 F.Supp. 1522 (N.D.Ala.1995); *Alabama ex rel. James v. ACLU*, 711 So.2d 952 (Ala.1998); *see Glassroth*, 229 F.Supp.2d at 1293-94.

[*2] During his campaign for the Chief Justice position in the November 2000 election, then-Judge Moore's campaign committee, capitalizing on name recognition from the lawsuits, decided to refer to him as the "Ten Commandments Judge." Although the Chief Justice says he never described himself that way, he did not disagree with his campaign committee's decision. As a result, most of his campaign materials, including billboards, television and radio commercials, telephone scripts, and mailings, described him as the "Ten Commandments

Judge" or otherwise referred to the Ten Commandments. The central platform of his campaign was a promise "to restore the moral foundation of law." *Glassroth*, 229 F.Supp.2d at 1294.

After he was elected, Chief Justice Moore fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building. *Id.* at 1294, 1303. That building houses the Alabama Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, the state law library, and the state's Administrative Office of the Courts. The Chief Justice, as administrative head of the Alabama judicial system and as lessee of the Judicial Building, has final authority over the decoration of the rotunda and whether to put any displays in the building. *See* Ala. Const. Amend. 328, § 6.10; Ala.Code § 41-10-275. Chief Justice Moore placed the monument in the rotunda of the Judicial Building without the advance approval or even knowledge of any one of the other eight justices of the Alabama Supreme Court. All decisions regarding it were made by him. *Glassroth*, 229 F.Supp.2d at 1294. He did not use any government funds in creating or installing the monument. *Id.*

Thousands of people enter the Judicial Building each year. In addition to attorneys, parties, judges, and employees, every fourth grader in the state is brought on a tour of the building as part of a field trip to the state capital. No one who enters the building through the main entrance can miss the monument. It is in the rotunda, directly across from the main entrance, in front of a plate-glass window with a courtyard and waterfall behind it. After entering the building, members of the public must pass through the rotunda to access the public elevator or stairs, to enter the law library, or to use the public restrooms. A person walking to the elevator, stairs, or restroom

will pass within ten to twenty feet of the monument. The Chief Justice chose the location of the monument so that everyone visiting the Judicial Building would see it. *Id.*

The 5280-pound granite monument is "approximately three feet wide by three feet deep by four feet tall." *Id.* Two tablets with rounded tops are carved into the sloping top of the monument. Excerpts from *Exodus* 20:2-17 of the King James Version of the Holy Bible, the Ten Commandments, are chiseled into the tablets. The left one reads:

> [*3] I am the Lord thy God
> THOU SHALT HAVE NO OTHER GODS BEFORE ME
> THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE
> THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN
> REMEMBER THE SABBATH DAY, TO KEEP IT HOLY

The right one reads:

> Honour thy father and thy mother
> THOU SHALT NOT KILL
> THOU SHALT NOT COMMIT ADULTERY
> THOU SHALT NOT STEAL
> THOU SHALT NOT BEAR FALSE WITNESS
> THOU SHALT NOT COVET[1]

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[1] Observant readers will notice that the tablets contain a total of eleven statements. Different faiths dispute how the sixteen verses in *Exodus* 20:2-17 should be divided to reflect the later references to "Ten

Glassroth, 229 F.Supp.2d at 1294-95; *id.* at 1320 (App. A-- photograph of the monument).

Below the Ten Commandments, each side of the monument contains one large-sized and several smaller-sized quotations. The quotations are excerpted from various historical documents and authorities. They are described and set out in full in the district court's opinion. *Id.* at 1295; *id.* at 1320-21 (App. B-- providing full quotations of the monument's text). The quotations from secular sources were placed below the Ten Commandments because of Chief Justice Moore's belief that the words of mere men could not be placed on the same plane as the Word of God. *Id.* at 1295.

"Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a lectern." *Id.* The appearance and location of the monument itself give one "the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred." *Id.* Employees and visitors to the building consider it an

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Commandments." *Exodus* 34:28; *Deuteronomy* 4:13, 10:4. As one expert testified at trial, "[e]ach tradition has struggled with how they should be numbered." For example, many Jews and some Christians consider the "First Commandment" to be "I am the Lord thy God," while others consider the First Commandment to be "Thou shalt [or You shall] have no other gods before me." More about the significance of this kind of disagreement for Establishment Clause purposes is found in note 3, below.

In any event, the division of the commandments between two tablets is significant. As the Chief Justice (who called them "tables") explained: "the first table represents the duties which we owe to GOD," and "[t]he second table represents the duties which we owe to each other." 1st Supp. Rec. Vol. 2 at 150.

appropriate and inviting place for prayer. *Id.*

The monument was installed after the close of business during the evening of July 31, 2001. The Chief Justice has explained that it was done at night to avoid interrupting the normal business of the building. The installation of the monument that night was filmed by Coral Ridge Ministries, an evangelical Christian media outreach organization. *Id.* at 1294. The organization has used its exclusive footage of the installation to raise funds for its own purpose and for Chief Justice Moore's legal defense, which it has underwritten. *Id.* at 1304 n. 2.

At the public unveiling of the monument the day after its installation, Chief Justice Moore delivered a speech commemorating the event, and in that speech he talked about why he had placed the monument, which he described as one "depicting the moral foundation of our law," where he did. He explained that the location of the monument was "fitting and proper" because:

> this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, the members of the bar who appear before them, as well as the people who visit the Alabama Judicial Building, of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance

of Almighty God."[2]

[*4] *Id.* at 1321-24 (App. C--reproducing the full text of Chief Justice Moore's remarks at the unveiling ceremony). During that speech, the Chief Justice criticized government officials who "forbid teaching your children that they are created in the image of Almighty God" and who "purport all the while that it is a government and not God who gave us our rights," because they have "turned away from those absolute standards which form the basis of our morality and the moral foundation of our law" and "divorced the Constitution and the Bill of Rights from these principles." *Id.* at 1322. Recalling his campaign "pledge to restore the moral foundation of law," he noted that "[i]t is axiomatic that to restore morality, we must first recognize the source of that morality," and that "our forefathers recognized the sovereignty of God." *Id.* He noted during the speech that no government funds had been expended on the monument.

The Chief Justice described various acknowledgments of God throughout this country's history, some of which, he pointed out, are inscribed on the monument. He proclaimed that the unveiling of the monument that day "mark[ed] the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." *Id.* at 1321. In closing, he told the audience that they would "find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our

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[2] *See* Ala. Const. Pmbl. ("We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.").

oath." *Id.* at 1324.

During the trial the Chief Justice testified candidly about why he had placed the monument in the rotunda. The following exchanges between him and one of the plaintiffs' attorneys establish that purpose:

> Q [W]as your purpose in putting the Ten Commandments monument in the Supreme Court rotunda to acknowledge GOD's law and GOD's sovereignty? ...
> A Yes.

1st Supp. Rec. Vol. 2 at 100.

> Q ...Do you agree that the monument, the Ten Commandments monument, reflects the sovereignty of GOD over the affairs of men?
> A Yes.
> Q And the monument is also intended to acknowledge GOD's overruling power over the affairs of men, would that be correct? ...
> A Yes.
> Q ... [W]hen you say "GOD" you mean GOD of the Holy Scripture?
> A Yes.

1st Supp. Rec. Vol. 3 at 34.

The rotunda is open to the public, but it is not a public forum where citizens can place their own displays. *Glassroth,* 229 F.Supp.2d at 1303. Chief Justice Moore has denied the two requests that have been made to place other displays in the

rotunda. He did so because he believed that those displays would have been inconsistent with the rotunda's theme of the moral foundation of law. An Alabama State Representative asked the Chief Justice if a monument containing the Rev. Dr. Martin Luther King Jr.'s famous "I Have a Dream" speech could be placed in the rotunda. The Chief Justice denied the request in a letter, stating that, "The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." *Id.* at 1297. He also denied an atheist group's request to display a symbol of atheism in the rotunda. *Id.*

The Chief Justice did add two smaller displays to the rotunda at some point after the Ten Commandments monument was installed. The first, a plaque entitled "Moral Foundation of Law," contains a quotation from the Rev. Dr. Martin Luther King Jr.'s letter from the Birmingham jail speaking of just laws and "the moral law or law of God," and a quotation from Frederick Douglass speaking of slavery as hiding man "from the laws of God." *Id.* at 1324-25 (App. D--providing a full quotation of the plaque). That plaque, which the Chief Justice paid for with his own money, measures forty-two inches by thirty- two inches. *Id.* at 1296. The second display is a brass plaque that contains the Bill of Rights. That plaque, measuring thirty inches by thirty-six inches, had been found in a box in the building. The Chief Justice added both plaques because he thought that they "comported with the 'moral foundation of law theme.' " *Id.* The two plaques are inconspicuous compared to the Ten Commandments monument. Each is not only much smaller than the monument, but also is located seventy-five feet from it. A person standing in front of the monument cannot see either plaque. Nothing about their location or appearance indicates that they are connected to the monument. *Id.*

[*5] The three plaintiffs are practicing attorneys in the Alabama courts. As a result of their professional obligations, each of them has entered, and will in the future have to enter, the Judicial Building. Because of its location, they necessarily come in contact with the monument. The monument offends each of them and makes them feel like "outsiders." Because of the monument, two of the plaintiffs have chosen to visit the Judicial Building less often and enjoy the rotunda less when they are there. One of those two has avoided the building to the extent of purchasing law books and online research services instead of using the library, and hiring a messenger to file documents in the courts located in the Judicial Building. *Id.* at 1297.

II.

Pursuant to 42 U.S.C. § 1983, the three plaintiffs sued Chief Justice Moore in his official capacity as administrative head of Alabama's judicial system, claiming that his actions violated the Establishment Clause of the First Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. They sought a declaratory judgment that his actions were unconstitutional and an injunction to force him to remove the monument. Prior to trial, Chief Justice Moore's counsel requested--it may have been done jointly, but it is unclear from the record whether the plaintiffs actually joined or simply did not object to the request--that the district court judge visit the monument. The judge did so, accompanied by the attorneys for both sides. *Id.* at 1295.

After a seven-day bench trial, the district court concluded that Chief Justice Moore's actions violated the Establishment Clause because his purpose in displaying the monument was non-

secular and because the monument's primary effect is to advance religion. *Id.* at 1299, 1304. The court entered judgment to that effect and gave the Chief Justice thirty days to remove the monument voluntarily. After he declined to do so, the district court entered an order enjoining him from failing to remove the monument from the public areas of the Judicial Building. *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). The Chief Justice appealed, and the district court stayed its injunction pending appeal. *Glassroth v. Moore,* 242 F.Supp.2d 1068 (M.D.Ala.2002).

III.

[*6] As this Court recently explained, Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts. *King v. Richmond County,* 331 F.3d 1271, ----, slip op. 2541 (11th Cir.2003). As we have already noted, the facts set out in this opinion are taken largely from the district court's findings. The Chief Justice attacks those findings on several bases.

A.

First, he contends that the district court judge should not have made any factfindings based upon his viewing of the monument and its surrounds. The judge unquestionably made important factfindings as a result of what he saw when he viewed the monument and the rotunda in which it is located. That was error, the Chief Justice argues, because he had thought that the only purpose of the district court's view of the monument and the area around it was to provide the court with a physical context within which to assess the evidence admitted in the courtroom.

The sole decision cited by the Chief Justice in connection with the viewing issue is *Lillie v. United States*, 953 F.2d 1188 (10th Cir.1992), which involved a judge's uninvited viewing of the scene of the accident, outside the presence of counsel and without their knowledge. The Tenth Circuit concluded that was error because, "[w]ithout presence of counsel there is no way to be certain that the premises viewed are in the same condition as when the event occurred, or that the court does not view the wrong premises or objects." *Id.* at 1191. That is not a problem in this case, because the district court judge undertook the view only after fully discussing the matter with counsel for both sides and scheduling the time of the viewing with counsel in advance. And he undertook the view in their presence. There was no procedural irregularity or lack of notice.

The district court told the attorneys early in the status conference that if the case was decided on summary judgment motions, the court would not be making any findings of fact from its view. That is, of course, correct. Courts do not find facts when deciding summary judgment motions, but this case was not decided on summary judgment. As we will point out shortly, counsel for both sides fully expected that the district court judge would be considering the facts and circumstances he observed during the view if the case was decided by trial, as it was, instead of on summary judgment.

To the extent the Chief Justice is arguing that factfinders should never find facts from what they observe at a view but should only use what they see to put into context the facts they hear in the courtroom, we agree with the Tenth Circuit that "such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder

determine what the truth is and assimilate and understand the evidence is itself evidence." *Id.* at 1190; *accord Snyder v. Massachusetts,* 291 U.S. 97, 121, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934) (the "inevitable effect [of a view] is that of evidence, no matter what label the judge may choose to give it"), *overruled on other grounds by Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *In re Application to Take Testimony,* 102 F.R.D. 521, 524 (E.D.N.Y.1984) ("Authorities now generally agree that the view provides independent evidence."); *Foster v. State,* 70 Miss. 755, 12 So. 822, 823 (1893) ("To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight. The juror, on the view, sees, and thinks he knows what he sees, with all the conclusions flowing therefrom."); 6 John Henry Wigmore, *Wigmore on Evidence* § 1803 (James H. Chadbourn rev.1976) (the jury on a view is receiving evidence because "to view the thing itself in issue--i.e., the premises--is undoubtedly to consult a source of proof"); 2 Jack B. Weinstein, *Weinstein's Federal Evidence* (2d ed.) § 403.07[4] (2d ed. 2003) ("[T]he modern position is that the view does provide independent evidence."). Just as pictures of the monument and the rotunda that were submitted as exhibits are evidence, so too is what the judge saw when he viewed the actual monument and its setting.

[*7] In any event, "[i]t is 'a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.' " *United States v. Ross,* 131 F.3d 970, 988 (11th Cir.1997) (quoting *Crockett v. Uniroyal, Inc.,* 772 F.2d 1524, 1530 n. 4 (11th Cir.1985)). Counsel for Chief Justice Moore urged the district court judge

to undertake a view. When the judge said at a status conference that if summary judgment was granted the issue of looking at the monument would be moot, counsel for the Chief Justice disagreed, protesting that: "I believe it's almost incumbent upon the Court to walk into the Judicial Building," and "I still think it's almost necessary to take a look at this yourself because of the proximity and also because of just the manner in which the facts play out here." Rec. Vol. 12 at 15.

The district court judge asked if the lawyers were going to make arrangements for him to see the monument and point out what he was to see. Counsel for the plaintiffs answered, without objection, that both sides had agreed: "you just walk in the front door and everything in the rotunda is fair game. And we believe that the lawyers shouldn't speak unless you've got a question for us. And the lawyers would be there, none of their clients would be there, and that would be it." Rec. Vol. 12 at 17.

[*8] Counsel for the Chief Justice agreed with that statement about how the view should be conducted, and he made clear that the whole point was for the district court judge to be able to gather facts about the monument and its setting, saying:

> But I think with either the summary judgment motion or response, and/or the pretrial briefs, that there's going to be a lot of facts in there that will probably give each side's impression of how they interpret the inside of the rotunda. But I agree with [plaintiffs' counsel] that you're a jury. You have to walk in and see what you see and then [sic] just like a juror would.

Rec. Vol. 12 at 16-17.

During argument about the cross-motions for summary judgment, and before the view took place, counsel for the Chief Justice contended that summary judgment was improper because the district court needed to view the monument as part of the necessary "inquiry into the facts and circumstances":

> [T]he issue with regard to how a reasonable person would view the monument would require an examination of what you might call social facts, which would require at least an examination of the monument itself. This is why we believe it's important for you to go into the rotunda and view that monument and view the setting itself. Unless you see it yourself, and since the reasonable person test is a test that's supposed to be applied by the judge, it would be difficult for the judge to apply that particular test unless there was an inquiry into the facts and circumstances with regard to this matter.

Rec. Vol. 13 at 43-44. So eager was he to have the district court judge conduct the view "just like a juror would," that counsel for the Chief Justice volunteered his help in arranging parking for the district court judge at the Judicial Building. Any conceivable error was not just invited error, but invited error with a parking space.

B.

The Chief Justice also complains that the district court did not state its findings from the view into the record so that

the parties would have had an opportunity to challenge them before the court issued its opinion. He never asked the court to do that, and factfinders traditionally do not state facts into the record before deciding the case; juries never do. The parties were on notice that the court might make factfindings from what it saw during the view, and if either side had wanted those findings stated into the record before a decision was made, it should have requested that extraordinary procedure. Since neither side asked for that procedure, we need not decide whether it would have been necessary or appropriate if requested.

C.

[*9] In a related challenge to the district court's findings, the Chief Justice argues that the district court judge should not have relied upon his subjective impressions from viewing the monument and its surrounding space. Recall that this same party's counsel had urged the district court judge to undertake a view in order to find the "social facts" about how a reasonable person would see the monument and its surroundings. When the district court described how the monument and its presentation in the rotunda gave one a "sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred," *Glassroth*, 229 F.Supp.2d at 1295, the court was articulating findings about the impression the monument made on the viewer, and would make on a reasonable person viewing it. It was required to do that in order to apply the reasonable person test.

D.

Apart from the factfinding issues arising from the view, Chief Justice Moore also argues that the district court made factfindings not supported by the record. We review district court factfindings only for clear error, and as we have explained, "[w]e cannot hold a district court's finding of fact clearly erroneous unless, in view of the entire record, we are 'left with a definite and firm conviction that a mistake has been committed.' " *Eng'g Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 904 (11th Cir.1997) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). We cannot reach the requisite definite and firm conviction that a mistake in factfinding has been made, the Supreme Court has told us, where the district court has chosen one of two plausible views of the evidence. *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1511 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citations omitted).

The specific factfinding relating to the merits of the constitutional issue that the Chief Justice challenges is the district court's finding that "visitors and building employees consider the monument an appropriate, and even compelling, place for prayer." *Glassroth*, 229 F.Supp.2d at 1295. That is at least a plausible view of the evidence in light of the testimony of one of the plaintiffs that she had witnessed a group in prayer around the monument, and the testimony of a building employee that on several occasions he had prayed in front of the monument by himself and with other employees, silently and

out loud.

IV.

[*10] We turn now to the legal issues. The threshold one is whether these plaintiffs have standing to bring the lawsuits that led to these appeals. The Chief Justice disputes the district court's conclusion that they do, a conclusion we review *de novo*. *Ga. State Conf. of NAACP Branches v. Cox*, 183 F.3d 1259, 1262 (11th Cir.1999).

The applicable principles are well-settled:

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997) (citations omitted). For Establishment Clause claims based on non-economic harm, the plaintiffs must identify a "personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Ams. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 485, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982). In this type of case, plaintiffs have standing if they are " 'directly affected by the laws and practices against [which] their complaints are

directed,' " *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir.1987) (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed.2d 844 (1963)), such as where the plaintiffs are " 'forced to assume special burdens' to avoid 'unwelcome religious exercises,' " *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 (11th Cir.1983) (per curiam) (quoting *Valley Forge*, 454 U.S. at 487 n. 22, 102 S.Ct. at 766 n. 22).

The location of the monument in the rotunda of the Judicial Building makes it impossible for anyone using the stairs, elevators, or restrooms to avoid it. Everyone going to the state law library in the building has to walk past the monument. *Glassroth*, 229 F.Supp.2d at 1294. The three plaintiffs are attorneys whose professional duties require them to enter the Judicial Building regularly, and when they do so they must pass by the monument. None of them shares the Chief Justice's religious views, and all of them consider the monument offensive. It makes them feel like outsiders, and two of the plaintiffs have altered their behavior as a consequence. *Id.* at 1297. As we noted earlier, one of those two has incurred expenses in order to minimize contact with the monument, purchasing law books and online research to minimize use of the state law library and hiring messengers to file documents in the courts located in the building.

Under these facts, the two plaintiffs who have altered their behavior as a result of the monument have suffered and will continue to suffer injuries in fact sufficient for standing purposes. *See Schempp*, 374 U.S. at 224 n. 9, 83 S.Ct. at 1572 n. 9 (holding that school children and parents had standing to challenge a state law requiring the Bible to be read every morning in public schools); *Saladin*, 812 F.2d at 692-93

(holding that city residents had standing to challenge the city's placement of the word "Christianity" on its official seal because they regularly received correspondence bearing the seal and the seal made them feel like "second class citizens"); *Rabun County*, 698 F.2d at 1107-08 (holding that state residents who used public parks had standing to challenge the placement of a lighted Latin cross in a public park where they were unwilling to camp in that park because of the "physical and metaphysical impact of the cross"). Further, a favorable decision will likely redress their injuries. If Chief Justice Moore is required to remove the monument from the public area of the Judicial Building, the plaintiffs will no longer have to observe it or take actions to avoid going into the building.

[*11] Having concluded that those two plaintiffs have standing, we are not required to decide whether the other plaintiff, the one who has not altered his behavior as a result of the monument, has standing. *Rabun County*, 698 F.2d at 1108-09 ("Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action."); *accord Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981).

Contrary to Chief Justice Moore's contention, the injuries the plaintiffs assert are not based solely on their disagreement with his views about religion and government, which would be a non-redressable injury. While the Chief Justice's views may aggravate the emotional injury the plaintiffs suffer from viewing the monument, the worst of the wound is inflicted by the monument itself. The plaintiff who has incurred expense and inconvenience to avoid entering the building has

done so not because it houses the Chief Justice's chambers, but because the monument is there. The district court did not err by declining to dismiss the cases on standing grounds. Now to the merits of the constitutional issue.

V.

Because of this country's "history and tradition of religious diversity that dates from the settlement of the North American Continent," the Founders included in the Bill of Rights an Establishment Clause which prohibits any law "respecting an establishment of religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 589, 109 S.Ct. 3086, 3099, 106 L.Ed.2d 472 (1989). In the more than two centuries since that clause became part of our Constitution, the Supreme Court has arrived at an understanding of its general meaning, which is that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *Id.* at 590-91, 109 S.Ct. at 3099 (footnotes omitted). Some aspects of the Chief Justice's position in this case are aimed directly at that understanding. Take, for example, the one we address next.

A.

[*12] The First Amendment does not say that no government official may take any action respecting an establishment of religion or prohibiting the free exercise thereof. It says that "Congress shall make no law" doing that. Chief Justice Moore is not Congress. Nonetheless, he

apparently recognizes that the religion clauses of the First Amendment apply to all laws, not just those enacted by Congress. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947) (holding that the Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment). Even with that concession, his position is still plenty bold. He argues that because of its "no law" language, the First Amendment proscribes only laws, which should be defined as "rule[s] of civil conduct ... commanding what is right and prohibiting what is wrong." Brief of Appellant at 19 (quoting 1 William Blackstone, *Commentaries* *44). Any governmental action promoting religion in general or a particular religion is free from constitutional scrutiny, he insists, so long as it does not command or prohibit conduct. The monument does neither, but instead is what he calls "a decorative reminder of the moral foundation of American law." Brief of Appellant at 19.

The breadth of the Chief Justice's position is illustrated by his counsel's concession at oral argument that if we adopted his position, the Chief Justice would be free to adorn the walls of the Alabama Supreme Court's courtroom with sectarian religious murals and have decidedly religious quotations painted above the bench. Every government building could be topped with a cross, or a menorah, or a statue of Buddha, depending upon the views of the officials with authority over the premises. A creche could occupy the place of honor in the lobby or rotunda of every municipal, county, state, and federal building. Proselytizing religious messages could be played over the public address system in every government building at the whim of the official in charge of the premises.

However appealing those prospects may be to some, the

position Chief Justice Moore takes is foreclosed by Supreme Court precedent. *Allegheny County*, 492 U.S. at 612, 109 S.Ct. at 3110, which held unconstitutional the placement of a creche in the lobby of a courthouse, stands foursquare against the notion that the Establishment Clause permits government to promote religion so long as it does not command or prohibit conduct. *Id.*, 109 S.Ct. at 3110 ("To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict 'the logic of secular liberty' it is the purpose of the Establishment Clause to protect.") (citation omitted). To the same effect is the decision in *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992), where the Supreme Court explained that, "[a] school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." And in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir.1983), *prob. juris. noted and aff'd in part*, 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178, *cert. denied sub. nom. Bd. of Sch. Comm'rs of Mobile County v. Jaffree*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181, and *aff'd in part*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), this Court concluded that "[i]f a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." *Id.* at 1533-35.

B.

[*13] Another of the Chief Justice's broad-based attacks on the application of the Establishment Clause to his conduct

involves the definition of religion. He insists that for First Amendment purposes religion is "the duty which we owe to our Creator, and the manner of discharging it"; nothing more, nothing less. Brief of Appellant at 11-12 (quoting Virginia Declaration of Rights Art. I, § 16 (1776)). The Chief Justice argues that the Ten Commandments, as he has presented them in the monument, do not involve the duties individuals owe the Creator, and therefore they are not religious; instead, he says, they represent the moral foundation of secular duties that individuals owe to society.

The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith. *Allegheny County*, 492 U.S. at 590, 109 S.Ct. at 3099 ("Perhaps in the early days of the Republic these words [of the Establishment Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.") (internal marks omitted); *Wallace v. Jaffree*, 472 U.S. 38, 52-53, 105 S.Ct. 2479, 2487-88, 86 L.Ed.2d 29 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.") (footnote omitted); *Torcaso v. Watkins*, 367 U.S. 488, 495, 81 S.Ct. 1680, 1683-84, 6 L.Ed.2d 982 (1961). Chief Justice Moore's proffered definition of religion is inconsistent with the Supreme Court's because his presupposes a belief in God. We understand that the Chief Justice disagrees with the Supreme Court's definition of religion, but we are bound by it.

As for the other essential premise of Chief Justice Moore's argument--that the Ten Commandments monument depicts only the moral foundation of secular duties-- the Supreme Court has instructed us that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (footnote omitted). The *Stone* decision did not hold that all government uses of the Ten Commandments are impermissible; they may be used, for example, in a secular study of history, civilization, or comparative religion. *Id.* at 42, 101 S.Ct. at 194. Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature, and a particular governmental use of them is permissible under the Establishment Clause only if it withstands scrutiny under the prevailing legal test. As we discuss next, the use to which Chief Justice Moore, acting as a government official, has put the Ten Commandments in this case fails that test.

C.

[*14] For a practice to survive an Establishment Clause inquiry, it must pass the three-step test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111.

We follow the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union*

Free Sch. Dist., 508 U.S. 384, 398, 113 S.Ct. 2141, 2150, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring) ("[N]o fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the [*Lemon* test's] heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so."); *Wallace v. Jaffree*, 472 U.S. at 110, 105 S.Ct. at 2517 (Rehnquist, J., dissenting) ("The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize."); Elenore Cotter Klingler, Case Comment, *Constitutional Law: Endorsing a New Test for Establishment Clause Cases*, 53 Fla. L. Rev. 995 (2001). But it is even more often applied.

What the Supreme Court said ten years ago remains true today: "*Lemon*, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, 508 U.S. at 395 n. 7, 113 S.Ct. at 2148 n. 7. We applied the *Lemon* test in another religious display case just days before this one was orally argued. *See King v. Richmond County*, 331 F.3d 1271 (11th Cir.2003). In doing so, we observed that "[e]ven though some Justices and commentators have strongly criticized *Lemon*, both the Supreme Court and this circuit continue to use *Lemon*'s three-pronged analysis." *Id.* at 1276, slip op. at 2545-46 (footnote omitted). Having noted that again today, we proceed with the test.

Applying *Lemon*, the district court concluded that Chief Justice Moore's purpose in displaying the monument was not secular. It based that conclusion on the Chief Justice's own words, on the monument itself, and on the physical context in which it appears. *Glassroth*, 229 F.Supp.2d at 1299-1300. The court found the case not as difficult as those in which the Ten

Commandments display had "an arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion, nor does the evidence support the conclusion that the Ten Commandments were displayed as sort of a secular moral code." *Id.* at 1301. Instead, "[t]he Chief Justice's words unequivocally belie such purposes." *Id.*

Citing Justice O'Connor's concurring opinion in *Wallace v. Jaffree,* 472 U.S. at 74, 105 S.Ct. at 2499 (O'Connor, J., concurring), Chief Justice Moore argues that the district court erred by psychoanalyzing him and, as he puts it, "dissecting [his] heart and mind." Brief of Appellant at 42. *Wallace v. Jaffree* involved legislative purpose, not that of an individual governmental actor. 472 U.S. at 40, 105 S.Ct. at 2481. Besides, no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.

[*15] Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures, and that it was intended to acknowledge "God's overruling power over the affairs of men." 1st Supp. Rec. Vol. 2 at 100; 1st Supp. Rec. Vol. 3 at 34. In his unveiling speech, the Chief Justice described his purpose as being to remind all who enter the building that "we must invoke the favor and guidance of Almighty God." *Glassroth,* 229 F.Supp.2d at 1297, 1322 (App. C). And he said that the monument marked "the return to the knowledge of God in our land." *Id.* at 1323. He refused a request to give a famous speech equal position and prominence because, he said, placing "a speech of any man alongside the revealed law of God would tend to diminish the very purpose of the Ten Commandments monument." *Id.* at

1297.

Against the weight of all this evidence, Chief Justice Moore's insistence in his briefs and argument, and in part of his testimony, that the Ten Commandments as presented in his monument have a purely secular application is unconvincing. That argument is akin to the state's contention in *Stone* that the fine print about secular purpose on the Ten Commandments posters in that case gave them a constitutionally permissible purpose. 449 U.S. at 41, 101 S.Ct. at 193. At the bottom of each poster was a statement that: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the common law of the United States." *Id.*, 101 S.Ct. at 193. The Supreme Court said, "[u]nder this Court's rulings, however, such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Id.*, 101 S.Ct. at 193-94. The same is true here.

Under our circuit law, the purpose inquiry is a factual one, *see ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1110-11 (11th Cir.1983), and on appeal we are obligated to accept the district court's findings of fact unless they are clearly erroneous, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Clearly erroneous they are not. Moreover, even if we were free to review the determination *de novo*, having examined the record ourselves, we agree with the district court that it is "self-evident" that Chief Justice Moore's purpose in displaying the monument was non-secular. Given all of the evidence, including the Chief Justice's own words, we cannot see how a court could reach any other conclusion.

Our inquiry could end there, because "[w]hen evidence shows that endorsement or promotion of religion was a primary purpose for the challenged practice ... the practice violates the Establishment Clause." *King*, 331 F.3d at 1278, slip op. at 2548. But in the interest of completeness, we will also review the district court's additional holding that the monument had the primary effect of advancing religion.

[*16] "The effect prong asks whether ... the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer." *Id.* at 1279, slip op. at 2549. The district court concluded that a reasonable observer would view the monument's primary effect as an endorsement of religion. *Glassroth*, 229 F.Supp.2d at 1302-03. It based that conclusion on: the appearance of the monument itself; its location and setting in the rotunda; the selection and location of the quotations on its sides; and the inclusion on its face of the text of the Ten Commandments, which is an "undeniably ... sacred text," *Stone*, 449 U.S. at 41, 101 S.Ct. at 194, all of which contributed to "the ineffable but still overwhelming holy aura of the monument," *Glassroth*, 229 F.Supp.2d at 1303-04. The court also considered: the fact that the Chief Justice campaigned as the "Ten Commandments Judge"; his statements at the monument's unveiling; and the fact that the rotunda is not a public forum for speech. *Id.* The court concluded that a reasonable observer "would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity." *Id.* at 1304.

The parties agree that our review of the district court's effect ruling is plenary. Having reviewed the matter *de novo*, and aided by the district court's meticulous findings of fact, we

reach the same conclusion the district court did, which is to say that we also agree with the concession that Chief Justice Moore made in his testimony when he said that the monument "reflects the sovereignty of God over men." 1st Supp. Rec. Vol. 3 at 34. The monument fails two of *Lemon* 's three prongs. It violates the Establishment Clause.

D.

Chief Justice Moore contends that even if it cannot clear the *Lemon* test, the monument is saved by the Supreme Court's decision in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). In that case, the Supreme Court considered a challenge to the Nebraska Legislature's practice of employing a chaplain to lead it in prayer at the beginning of each session. *Id.* at 784-85, 103 S.Ct. at 3332-33. Applying the *Lemon* test to the practice, the court of appeals concluded that the practice of beginning legislative sessions with prayer violated all three requirements of the test. *Id.* at 786, 103 S.Ct. at 3333. The Supreme Court, without applying *Lemon,* reversed on the ground that the challenged practice was "deeply embedded in the history and tradition of this country." *Id.* at 795, 103 S.Ct. at 3333, 3338.

The Court recounted the history of the practice, finding that "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* at 786, 103 S.Ct. at 3333. The Court further noted that Congress authorized the appointment of paid chaplains just days before a final agreement on the language of the Bill of Rights was reached. *Id.* at 787-88, 103 S.Ct. at 3333-34. "Clearly the men who wrote the First Amendment Religion

Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788, 103 S.Ct. at 3334 (footnote omitted). The Court concluded that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792, 103 S.Ct. at 3336.

[*17] Turning back to this case, there is no evidence of an "unambiguous and unbroken history" of displaying religious symbols in judicial buildings. Chief Justice Moore insists, though, that *Marsh* must be read much more broadly, that the issue turns on "whether the monument's acknowledgments of God as the source of law and liberty in America parallel similar acknowledgments of God at the time of America's founding." Brief of Appellant at 44. That there were some government acknowledgments of God at the time of this country's founding and indeed are some today, however, does not justify under the Establishment Clause a 5280-pound granite monument placed in the central place of honor in a state's judicial building. The Supreme Court has warned that a broad reading of *Marsh* "would gut the core of the Establishment Clause" and has stated that "*Marsh* plainly does not stand for the sweeping proposition ... that all accepted practices 200 years old and their equivalents are constitutional today." *Allegheny County*, 492 U.S. at 603-04, 109 S.Ct. at 3106.

Chief Justice Moore has pointed to no evidence that the Ten Commandments in any form were publicly displayed in any state or federal courthouse, much less that the practice of displaying them was widespread at the time the Bill of Rights

was proposed and adopted. However it may be applied in any other context and circumstances, we do not believe that *Marsh* saves the Ten Commandments monument in this case from the proscriptions of the Establishment Clause.

E.

The result we reach in this case is not inconsistent with our recent decision in *King*, 331 F.3d at ----, slip op. 2541. In that case, we applied the *Lemon* test and concluded that the Seal of the Richmond County Superior Court did not violate the Establishment Clause despite its inclusion of a depiction of the Ten Commandments. *Id.* at ----, slip op. at 2556. The Seal included an image of two tablets, the first with Roman numerals I through V and the second with numerals VI through X. *Id.* at ----, slip op. at 2543. The Seal had been in use for more than one hundred thirty years, and there was no evidence about why the pictograph of the Commandments was originally included. The county proffered a plausible secular purpose, which was that the Commandments allowed illiterate Georgians to recognize the Seal as a symbol of law, and in the absence of any showing that the proffered secular purpose was implausible, we concluded that the County had satisfied the purpose prong of the *Lemon* test. *Id.* at ---- - ----, slip op. at 2546-48.

On the effect prong, we noted in *King* that the constitutionality of a government's use of a predominantly religious symbol depends on the context in which it appears, *id.* at ---- - ----, slip op. at 2548-52, and we concluded that given the context in which the pictograph of the Ten Commandments appeared on the Seal, a reasonable observer would not believe that the Seal was an endorsement of religion. *Id.* at ---- - ----, slip op. at 2552-56. Alongside the tablets on the Seal was a

sword, which is a symbol of the legal system, and we reasoned that the depiction of the Ten Commandments on that Seal must be taken in context. "Like the secular decorations surrounding the creche in *Lynch* or the other lawgivers who accompany Moses and the Ten Commandments on the south wall frieze of the Supreme Court building, the Seal's sword and the words 'SUPERIOR COURT RICHMOND COUNTY, GA' contextualize the Ten Commandants pictograph." *Id.* at 1284, slip op. at 2554 (footnote omitted).

[*18] In *King*, we also gave weight to the small size of the tablets: "[T]he pictograph of the tablets and sword is at most only one inch in diameter and is not the focal point of any governmental display in an important public building." *Id.* at 1285, slip op. at 2555. Finally we noted that the tablets did not include the text of the Ten Commandments, and that a reasonable observer would therefore be less likely to focus on the religious aspects of the Commandments. *Id.* at ---- - ----, slip op. at 2555-56.

The distinctions between that case and this one are clear. In *King*, there was no evidence of a non-secular purpose; in this case, there is an abundance of evidence, including parts of the Chief Justice's own testimony, that his purpose in installing the monument was not secular. In *King*, the image was in the context of another symbol of law; in this case the monument sits prominently and alone in the rotunda of the Judicial Building. In *King*, the image was approximately one-inch in size and not a focal point; in this case the monument is an unavoidable two-and-one-half ton centerpiece of the rotunda. Finally, there was no text of the Commandments on the Seal in *King;* in this case the monument contains text from the King

James version of the Bible.[3]

Nor is our decision today inconsistent with those from any other circuits in recent years involving the Ten Commandments. The Third Circuit issued an opinion just days before this one holding that the inaction of county commissioners with respect to a plaque that had been on the outside wall of a historically significant courthouse for more than eighty years did not violate the Establishment Clause.

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[3] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982). Several amici in this case have pointed out that Chief Justice Moore chose the excerpts of the Ten Commandments from the King James Version of the Bible, which is a Protestant version. Jewish, Catholic, Lutheran, and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments. "In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 474-76 & n. 18 (1998); *cf. Lemon*, 403 U.S. at 628-29, 91 S.Ct. at 2119 (noting the conflict between Catholics and Protestants over the use of the King James Version of the Bible in nineteenth century public schools). To give but one example, the Hebrew translation of the Sixth Commandment prohibits only murder, not all killings as the King James Version does (and in the Lutheran and Catholic versions it is the Fifth Commandment, not the Sixth). *See* Brief of Amicus Curiae The American Jewish Congress at 15 (citing Gerald Blidstein, *Capital Punishment: The Classic Jewish Discussion*, in 14 *Judaism* 159 (1965)); Brief of Amicus Curiae Ala. Clergy, *et al.* at 14; Brief of Amicus Curiae Am.-Arab Anti-Discrimination Comm. at 13 n. 4; *see also Harvey v. Cobb County*, 811 F.Supp. 669, 677 (N.D.Ga.1993) ("As Rabbi Lewis testified, this ['Thou shalt not kill'] version of the Sixth Commandment is a mistranslation of the original Hebrew, which prohibits murder, and frequently appears in Christian versions of the Ten Commandments."), *aff'd mem.*, 15 F.3d 1097 (11th Cir.1994). The point is that choosing which version of the Ten Commandments to display can have religious endorsement implications under the Establishment Clause.

Freethought Soc'y v. Chester County, --- F.3d ----, No. 02-1765, 2003 WL 21468470 (3d Cir. June 26, 2003). That case is readily distinguishable from this one because the plaque had been there more than eight decades and no government entity or official has done anything in modern times to highlight or celebrate its existence, or even to maintain it; the plaque is not located in a prominent place but instead is away from the main entrance of the courthouse near a permanently closed door where visitors have no reason to go; and the text of the plaque is not visible to passersby on the sidewalk, who can see only the title "The Commandments." *Id.* at ---- - ----, ---- - ----, ---- - ----, man. op. at 5-7, 11-12, 31-33; *id.* at ----, 39 (Bright, J., concurring).

As the Third Circuit noted in the *Freethought Society* case, "a new display of the Ten Commandments is much more likely to be perceived as an endorsement of religion" by the government than one in which there is a legitimate "preservationist perspective." *Id.* at ----, ----, 31, 32; *see also id.* at ----, 33 ("[I]t is highly significant that there is no evidence that the County has taken any action involving the plaque since it was erected 80 years ago."); *id.* at ----, 39 (Bright, J., concurring) (noting the "crucial facts" that the location of the plaque was not changed when the old entrance near it was closed, leaving the plaque barely visible from the street and its text mostly obscured, and concluding that "[a] world of difference exists between the conduct of the Chester County officials approving the placement of the plaque at the then main entrance to the Chester County Courthouse eighty-three years ago and the decision of Chester County not to remove the plaque as of today").

[*19] This case on its facts is closer to those in which

the Sixth and Seventh Circuits have held prominent displays of the Ten Commandments on government grounds to violate the Establishment Clause. *See Adland v. Russ,* 307 F.3d 471 (6th Cir.2002) (returning a large, granite Ten Commandments monument from storage to a prominent position on the capitol grounds would violate the Establishment Clause), *cert. denied,* --- U.S. ----, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003); *Ind. Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir.2001) (erecting a seven-foot tall, 11,500-pound limestone monument, one side of which contained the Ten Commandments, on statehouse grounds would violate the Establishment Clause) *cert. denied,* 534 U.S. 1162, 122 S.Ct. 1173, 152 L.Ed.2d 117 (2002); *Books v. City of Elkhart,* 235 F.3d 292 (7th Cir.2000) (displaying a Ten Commandments monument, identical to the one involved in *Adland,* on the lawn of the municipal building violated the Establishment Clause), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

F.

The difference in results between the *King* and *Freethought Society* decisions on the one hand, and the *Adland, Books,* and *O'Bannon* decisions on the other hand, illustrates that factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays.[4] Our decision is necessarily limited to the

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[4] Chief Justice Moore contends that under the district court's reasoning, the sculpture of "Themis," the Greek goddess of justice, which is part of the fountain in front of the courthouse where the trial in this case took place, would also be unconstitutional. Brief of Appellant at 15 n. 4. His contention ignores the clear factual and contextual distinctions between that sculpture and the Ten Commandments monument. There is no evidence that the sculpture has had the effect of furthering religion, or that its purpose was

case before us. It implies nothing about different cases involving other facts. We do not say, for example, that all recognitions of God by government are per se impermissible. Several Supreme Court Justices have said that some acknowledgments of religion such as the declaration of Thanksgiving as a government holiday, our national motto "In God We Trust," its presence on our money, and the practice of opening court sessions with "God save the United States and this honorable Court" are not endorsements of religion. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 322-23, 120 S.Ct. 2266, 2286, 147 L.Ed.2d 295 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) (the Establishment Clause does not prohibit singing the National Anthem with its concluding verse "And this be our motto: 'In God is our trust' "); *Lynch,* 465 U.S. at 693, 104 S.Ct. at 1369-70 (O'Connor, J., concurring) ("Those government acknowledgments of religion [declaration of Thanksgiving as a holiday, the national motto on money, and the opening of court sessions with reference to God] serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."); *id.* at 717, 104 S.Ct. at 1382 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.) (such acknowledgments are immune from Establishment Clause challenges "because they have lost through rote repetition any significant religious content"). In its *Allegheny County* decision, the Supreme Court did not imply that such acknowledgments of

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to do so.

God in the Pledge of Allegiance and the National motto violate the Establishment Clause, "because there is an obvious distinction between creche displays and references to God in the motto and the pledge." *Allegheny County*, 492 U.S. at 603, 109 S.Ct. at 3106. For the same reason, our decision in this case does not imply that, either.[5]

VI.

[*20] Finally, we turn to a position of Chief Justice Moore's that aims beyond First Amendment law to target a core principle of the rule of law in this country. He contends that the district court's order and injunction in this case contravene the right and authority he claims under his oath of office to follow the state and federal constitutions "as he best understands them, not as understood by others." Brief of Appellant at 51. He asserts that "courts are bound by the Constitution, not by another court's interpretation of that instrument," and insists that he, as Chief Justice is "not a ministerial officer; nor is he answerable to a higher judicial authority in the performance of his duties as administrative head of the state judicial system."[6]

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[5] While we are on the subject of what the decision in this case does not mean, we reject Chief Justice Moore's argument that this decision means that the Establishment Clause requires "the purging of all 'religious' sources from any opinions that the Chief Justice might write such as the one in *Yates v. El Bethel Primitive Baptist Church*, [No. 1001913, (Ala. Oct. 11, 2002) (Moore, C.J., dissenting)]." Brief of Appellant at 28. It means no such thing.

[6] A critical distinction is worth mentioning here. While all state and federal courts are bound to follow decisions of the United States Supreme Court, state courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n. 11, 117 S.Ct. 1055, 1064

Brief of Appellant at 53.

The Chief Justice's brief reminds us that he is "the highest officer of one of the three branches of government in the State of Alabama," and claims that because of his important position, "Chief Justice Moore possesses discretionary power to determine whether a court order commanding him to exercise of [sic] his duties as administrative head is consistent with his oath of office to support the federal and state constitution." Brief of Appellant at 54. Article VI, clause 3, of the United States Constitution states: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...." Article XVI, section 279 of the Alabama Constitution requires state officials to take a similar oath or affirmation to support the federal and state constitutions. Chief Justice Moore's argument takes his obligation and turns it into a license. To say the least, there is nothing in law or logic to support his theory.

The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court

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n. 11, 137 L.Ed.2d 170 (1997); *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir.1996). That is different from what we have here. At issue here is not a judicial decision of the Alabama Supreme Court, eight-ninths of which had nothing to do with the challenged action. At issue here is the conduct of a party, who concedes he acted not judicially but as the administrative head of a state government department, and in that capacity his conduct is subject to as much scrutiny as that of any head of any government department.

below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. *See generally, e.g., Meredith v. Fair,* 328 F.2d 586, 589-90 (5th Cir.1962) (en banc) (enjoining Mississippi Governor Ross Barnett from interfering with the district court's order to admit a black student to the University of Mississippi); *Williams v. Wallace,* 240 F.Supp. 100, 110 (M.D.Ala.1965) (Johnson, J.) (enjoining Alabama Governor George C. Wallace from interfering with and failing to provide police protection for plaintiffs' march from Selma to Montgomery); *cf. United States v. Barnett,* 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23 (1964) (holding that the Governor of Mississippi was not entitled to a jury trial on a charge of criminal contempt for willfully disobeying a temporary restraining order of a federal district court).

Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case. *See* U.S. Const. Art. III, § 1; *id.* Art. VI, cl. 2. What a different federal district court judge wrote forty years ago, in connection with the threat of another high state official to defy a federal court order, remains true today:

> [*21] In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has

> been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.

United States v. Wallace, 218 F.Supp. 290, 292 (N.D.Ala.1963) (enjoining Governor George C. Wallace from interfering with the court-ordered desegregation of the University of Alabama); *accord, e.g., Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Sterling v. Constantin,* 287 U.S. 378, 397-98, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932) (stating that if a state Governor could nullify a federal court order "that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases").

The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.

VII.

AFFIRMED.

EDMONDSON, Chief Judge, concurs in the result.

229 F. Supp. 2d 1290

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
ROY S. MOORE, Chief Justice	)	
of the Alabama Supreme Court,	)	
	)	
Defendant.	)	
	)	
	)	
MELINDA MADDOX and	)	
BEVERLY HOWARD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
ROY MOORE,	)	
in his official capacity,	)	
	)	
Defendant.	)	

OPINION

The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment to the United States Constitution, provides that government "shall make no law respecting an establishment of religion." The question presented to this court is whether the Chief Justice of the Alabama Supreme Court violated the Establishment Clause when he placed a slightly over two-and-a-half ton granite monument--engraved with the Ten Commandments and other references to God--in the Alabama State Judicial Building with the specific purpose and effect, as the court finds from the evidence, of acknowledging the Judeo-Christian God as the moral foundation of our laws. To answer this question, the court applies two Supreme Court precedents: Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971), and Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983).

Based on the evidence presented during a week-long trial and for the reasons that follow, this court holds that the evidence is overwhelming and the law is clear that the Chief Justice violated the Establishment Clause. But, in announcing this holding today, the court believes it is important to clarify at the outset that the court does not hold that it is improper in all instances to display the Ten Commandments in government buildings; nor does the court hold that the Ten Commandments are not important, if not one of the most important, sources of American law. Rather the court's limited holding, as will be explained below in more detail, is that the Chief Justice's actions and intentions in this case crossed the Establishment

Clause line between the permissible and the impermissible.

I.

The plaintiffs in these two consolidated lawsuits are Stephen R. Glassroth, Melinda Maddox, and Beverly Howard. The defendant is Roy S. Moore, Chief Justice of the Alabama Supreme Court. The plaintiffs seek enforcement of the First and Fourteenth Amendments to the United States Constitution through 42 U.S.C.A. § 1983. The court's jurisdiction has been properly invoked pursuant to 28 U.S.C.A. §§ 1331 (federal question) and 1343(a)(3) (civil rights).

The events giving rise to this litigation go back several years. As a state court judge in Gadsden, Alabama, then-Judge Moore displayed a hand-carved plaque of the Ten Commandments in his courtroom. He also invited clergy to lead prayer in his courtroom before trials. These acts led to two highly publicized lawsuits involving the American Civil Liberties Union of Alabama. The first, brought in March 1995, was dismissed for lack of standing. See Alabama Freethought Ass'n v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995). The second, brought in April 1995 by the State of Alabama, sought a declaratory judgment that Judge Moore's display of the Ten Commandments was constitutional; that lawsuit was dismissed by the Alabama Supreme Court as nonjusticiable. See Alabama ex rel. James v. ACLU of Alabama, 711 So. 2d 952 (Ala. 1998). A large part of Judge Moore's funding for these lawsuits--$170,000--came from Coral Ridge Ministries, an evangelical Christian media outreach organization with

television and radio broadcasts that cover all major Alabama cities.

On November 7, 2000, Judge Moore was elected Chief Justice of the Alabama Supreme Court. During his campaign for Chief Justice, Judge Moore capitalized on the name recognition that he had obtained during the 1995 lawsuits. Judge Moore's campaign referred to him as the "Ten Commandments Judge," and virtually everything put out by the campaign referenced the Ten Commandments. Shortly after his election, now-Chief Justice began designing a monument depicting, in his words, "the moral foundation of law" and reflecting "the sovereignty of God over the affairs of men." By God, the Chief Justice specifically meant the Judeo-Christian God of the Holy Bible and not the God of any other religion.

On August 1, 2001, Chief Justice Moore unveiled a 5,280-pound granite monument in the large colonnaded rotunda of the Alabama State Judicial Building, which houses the Alabama Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, the state law library, and the Alabama Administrative Office of Courts. Coral Ridge Ministries filmed both the monument's installation, which occurred the night before, and its unveiling; it was the only media outlet to film either occasion. The Chief Justice installed the monument with neither the approval nor the knowledge of the Alabama Supreme Court's other eight justices. He made all final decisions with regard to the specific language appearing on the monument, as well as its size, shape, color, and location within the Judicial Building. No tax dollars were used in the

monument's construction or installation. Chief Justice Moore has final authority over what decorations may be placed in the Judicial Building rotunda.

The monument is located directly across from the main entrance to the Judicial Building, in front of a large plate-glass window, with a courtyard and waterfall behind it. The monument and the area surrounding it are roped off. A person entering the Judicial Building through its main entrance, and looking across the large open area of the rotunda, will see the monument immediately. The Judicial Building's public stairwell, public elevator, and law library are all accessed through the rotunda. Anyone who uses the public bathrooms in the Judicial Building rotunda must walk by the monument. The Chief Justice chose to display the monument in this location so that visitors to the Alabama Supreme Court would see the monument. While not in its center, the monument is the centerpiece of the rotunda.

The monument is in the shape of a cube, approximately three feet wide by three feet deep by four feet tall. The top of the monument is carved as two tablets with rounded tops, the common depiction of the Ten Commandments; these tablets slope toward a person viewing the monument from the front. The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a podium. A picture of the front view of the monument is attached as Appendix A to this opinion.

Engraved on the left tablet is: "I am the Lord thy God"; "Thou shalt have no other Gods before me"; "Thou shalt not make unto thee any graven image"; "Thou shalt not take the name of the Lord thy God in vain"; and "Remember the sabbath day, to keep it holy." Engraved on the right tablet is: "Honour thy father and thy mother"; "Thou shalt not kill"; "Thou shalt not commit adultery"; "Thou shalt not steal"; "Thou shalt not bear false witness"; and "Thou shalt not covet." In addition, the four sides of the monument are engraved with fourteen quotations from various secular sources; these sources are identified on the monument to the extent that each quotation is accompanied by the name of a document or an individual. On each side of the monument, one of the quotations is larger than the others and is set apart in relief. The smaller quotations on each side are intended to relate to that larger quotation. The north (front) side of the monument has a large quotation from the Declaration of Independence, "Laws of nature and of nature's God," and smaller quotations from George Mason, James Madison, and William Blackstone that speak of the relationship between nature's laws and God's laws. The large quotation on the west (right) side of the monument is the National Motto, "In God We Trust"; the smaller quotations on that side were excerpted from the Preamble to the Alabama Constitution and the fourth verse of the National Anthem. The south (back) side of the monument bears a large quotation from the Judiciary Act of 1789, "So help me God," and smaller quotations from George Washington and John Jay speaking of oaths and justice. The east (left) side of the monument has a large quotation from the Pledge of Allegiance 1954, "One nation under God, indivisible, with liberty and justice for all,"

and smaller quotations from the legislative history of the Pledge, James Wilson, and Thomas Jefferson suggesting that both liberty and morality are based on God's authority. The full quotations from all four sides of the monument are attached as Appendix B to this opinion.

Additionally, at the request of the parties, the court visited the monument before beginning trial because all agreed that a personal on-site viewing of the monument was essential to capture fully not only the monument but its context as well. The court found the monument to be, indeed, much more than the sum of its notable quotations, large measurements, and prominent location. The court was captivated by not just the solemn ambience of the rotunda (as is often true with judicial buildings), but by something much more sublime; there was the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred. Thus, it was not surprising to the court that, in describing at the process of designing the monument, the Chief Justice emphasized that the secular quotations were placed on the sides of the monument, rather than on its top, because these statements were the words of mere men and could not be placed on the same plane as the Word of God. Nor was it surprising to the court that, as the evidence reflected, visitors and building employees consider the monument an appropriate, and even compelling, place for prayer. The court is impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse.

At the monument's unveiling ceremony, Chief Justice Moore made a speech noting that the monument depicted the "moral foundation of law." But consistent with the impression the court had when it viewed the monument and consistent with his intent to design the monument to emphasize the preeminence of God's Word, the Chief Justice made clear the monument was ultimately a monument to the giver of this moral foundation, the Judeo-Christian God, and, in particular, to his sovereignty over all the affairs of men. He explained that the monument "serves to remind the Appellate Courts and judges of the Circuit and District Court of this State and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama Constitution that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" The Chief Justice expressed his disagreement with those judges and other government officials who "purport that it is government--and not God--who gave us our rights." He said that these officials have "turned away from those absolute standards that serve as the moral foundation of law." In the Chief Justice's opinion, to restore this moral foundation of law, "we must first recognize the source from which all morality springs ... [by] recogniz[ing] the sovereignty of God." Finally, the Chief Justice said that he hoped that "this day marks the beginning of the restoration of the moral foundation of law to our people and a return to the knowledge of God in our land." Because of its importance to this litigation, a transcript of the Chief Justice's entire speech is attached as Appendix C to this opinion.

At the time of its installation, the monument was intended to be the only object decorating the Judicial Building rotunda. Almost two months later, though, the Chief Justice added two more displays to the rotunda. The first, added in late September, is a marble plaque with quotations from Rev. Dr. Martin Luther King, Jr., speaking of just and unjust laws, and Frederick Douglass, speaking of the injustice of slavery, entitled "Moral Foundation of Law." The Chief Justice commissioned this plaque himself. The moral foundation of law plaque is forty-two inches by thirty-two inches and is located on a wall seventy-five feet away from the monument. The Chief Justice installed this plaque because the contributions of these men "have been significant and their reliance upon the laws of God to secure freedom and liberty should be recognized and would support the very purpose of the Ten Commandments monument." The full text of this plaque is attached as Appendix D to this opinion.

Added in early October, the second display is a brass plaque with the Bill of Rights to the United States Constitution. This plaque was discovered in a box in the Judicial Building shortly before it was put on another wall in the rotunda. It, too, is located on the wall, seventy-five feet from the monument; this plaque is thirty inches by thirty-six inches. The Chief Justice testified that this plaque was placed in the rotunda because it also comported with the "moral foundation of law" theme.

No sign indicates that the monument is connected with or related to these plaques. A person standing directly in front

of the monument cannot see either plaque. Indeed, unlike the monument, the plaques are behind the rotunda colonnade. Visitors to the Judicial Building could easily miss or overlook the plaques. Indeed, in their written submissions to the court, the Chief Justice's attorneys described the plaques as "inconspicuous." At trial, and long after plaintiffs' attorneys had in their own submissions specifically noted this concession, the Chief Justice's attorneys said that they had misspoken and intended to describe the plaques as "conspicuous." Having seen the plaques, the court agrees with the Chief Justice's attorneys' first description of the plaques, intended or not.

Others have requested that the Chief Justice add additional items to the rotunda, requests that the Chief Justice has denied because the proposed items did not comport with the moral foundation of law theme. Alabama State Representative Alvin Holmes requested the inclusion of a monument containing Rev. Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, a request that the Chief Justice denied. In denying this request, the Chief Justice stated, "The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." Additionally, an atheist group's request to display a sculpture of an atheist symbol--an atom--was denied by the Chief Justice as inconsistent with the rotunda's theme.

II.

A.

Chief Justice Moore argues that these two lawsuits should be dismissed because the plaintiffs do not have standing to bring them. The Supreme Court has held that, at "an irreducible minimum," a person seeking to invoke a court's authority must have standing, that is, must be able to "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982) (citations omitted). To have standing to challenge a display under the Establishment Clause, the plaintiffs must suffer personal injury "as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." Id. at 485, 102 S. Ct. at 765 (emphasis in original). The personal injury may be noneconomic in nature. Id. at 486, 102 S. Ct. at 766. An "effect on an individual's use and enjoyment of public land is a sufficient noneconomic injury to confer standing to challenge governmental actions." ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1105 (11th Cir. 1983).

All three plaintiffs are attorneys who regularly practice law in Alabama's courts. Each has testified that he or she has come into direct contact with the monument on multiple

occasions, and each expects to do so in the future as a result of his or her professional obligations. Each finds the monument offensive, and each has said the monument makes him or her feel like an "outsider." Furthermore, two plaintiffs, Howard and Maddox, have changed their behavior as a result of the monument: each visits the rotunda less frequently and enjoys the rotunda less because of the monument's presence. The monument has, therefore, had a direct negative effect on each plaintiff's "use and enjoyment" of the rotunda. Id. at 1105.

The Chief Justice responds that the plaintiffs, nevertheless, do not have standing to bring these cases on the ground that their testimony is not credible. Toward this, the Chief Justice has elicited statements by the plaintiffs showing that they were offended by the Chief Justice's actions before he placed the monument in the State Judicial Building rotunda. For example, plaintiff Glassroth testified in his deposition that he found the use of the Ten Commandments in the Chief Justice's campaign to be "a shameless political use of religion." Plaintiff Maddox, too, thinks that the Chief Justice is "using religion to further his political career"; she also says she was "embarrassed" by the Chief Justice long before he was elected Chief Justice, when, as a state trial judge, he displayed a Ten Commandments plaque in his courtroom. Maddox admitted she was willing to become a plaintiff in these cases before she saw the monument in person. Finally, plaintiff Howard says she is bothered by the Chief Justice's reliance on his religious views in making his decisions as Chief Justice.

While these facts show that the plaintiffs may have been

predisposed to being offended by the monument, they do not go so far as to discredit their testimony that they are, in fact, offended by the monument. Instead, the Chief Justice simply has demonstrated that the plaintiffs have been previously offended by his actions. The Chief Justice suggests that, because of this previous offense, the plaintiffs cannot also have been injured by the monument. This argument is untenable. The plaintiffs' previous offense is consistent with, rather than contradictory to, their offense about the monument. If the court were to find otherwise, it would be mandating that plaintiffs must assert their claims at the first instance of their offense to a defendant's actions or lose their opportunity to complain about later actions; conversely, such holding would also mean that government officials could act without regard to the constitutionality of their actions, so long as they first offended any potential plaintiffs at an earlier time.

The Chief Justice also takes issue with the plaintiffs' testimony that they feel like "outsiders"; he maintains that they are independent thinkers, or are actively involved in their communities, or are thick-skinned. He observes that plaintiff Glassroth serves as a member of the board of directors for the Federal Defenders of the Middle District of Alabama and on the Alabama Sentencing Commission; that plaintiff Maddox is referred to by others and even herself as "the tiny tiger"; and that plaintiff Howard identifies herself as a political independent. The fact that the plaintiffs are strong and accomplished individuals in general, however, is not inconsistent with the fact that they feel like, and are, outsiders within the walls of the Alabama State Judicial Building. If

anything, this fact reflects that the plaintiffs are among the few, if not the only, attorneys who have the commendable courage to sue a judge or justice to seek personal redress under the First Amendment for the harm they have suffered and continue to suffer. Standing is not the sole province of the weak; if anything, as a matter of practice if not the law, it is that of the strong, for only they will rise to assert it.

The plaintiffs have all testified that they have been injured as a direct result of their contact with the monument, and the court finds their testimony credible in full. The plaintiffs have standing to pursue their Establishment Clause claim.[1]

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[1] Admittedly, in Alabama Freethought Ass'n v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995), mentioned earlier, the district court found that the plaintiffs lacked standing. In that case, the court found that the plaintiffs did not provide "allegation[s] nor evidence that plaintiffs [were] in imminent threat of being" subjected to the challenged display, id. at 1544, nor did the plaintiffs provide evidence that their regular course of business required their presence in Judge Moore's courtroom. Id. at 1528-29. Indeed, only one plaintiff in that case was ever required to be in Judge Moore's courtroom, and, then, only for a few moments. Id. at 1527. The plaintiffs tried to assert standing on the fact that they were "subject to" the possibility of coming into contact with the challenged display, either as potential litigants or jurors in Judge Moore's courtroom. Id. at 1544. The case before this court is patently distinguishable, as each plaintiff testified that their professional duties did require and will continue to require their presence in the Alabama State Judicial Building. Therefore, the district court's finding in Alabama Freethought Association, that the plaintiffs lacked standing, has no bearing on the issue of the plaintiffs' standing in this case.

B.

With the standing issue resolved, the court moves to the heart of its Establishment Clause inquiry. For a practice to survive an Establishment Clause challenge, it "must have a secular legislative purpose, ... its principal or primary effect must be one that neither advances nor inhibits religion, ... [and it] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971) (citations omitted). The plaintiffs contend that Chief Justice Moore's display of the monument fails this test, frequently called the Lemon test, in two ways: (1) his fundamental, if not sole, purpose in displaying the monument was non-secular; and (2) the monument's primary effect advances religion.

1.

That Chief Justice Moore's purpose in displaying the monument was non-secular is self-evident. First, it is self-evident from his own words. At the monument's unveiling ceremony, the Chief Justice explained that the monument "serves to remind ... that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" He made clear that, in order to restore this moral foundation of law, "we must first recognize the source from which all morality springs ... [by] recogniz[ing] the sovereignty of God." Thus, he made clear that, while the monument depicted the "moral foundation of law," it was ultimately a monument to the giver of this foundation, the Judeo-Christian God. He saw the placement of

the monument in the Judicial Building rotunda as not only "the beginning of the restoration of the moral foundation of law to our people," but, more fundamentally, as "a return to the knowledge of God in our land."

In his trial testimony before this court, the Chief Justice gave more structure to his understanding of the relationship of God and the state, and the role the monument was intended to play in conveying that message. He explained that the Judeo-Christian God reigned over both the church and the state in this country, and that both owed allegiance to that God. In other words, the Chief Justice described essentially a vertical or standing triangle, with God at the top as the sovereign head, and with the state and the church, side-by-side, forming the base under God.

The Chief Justice also explained at trial how his design and placement of the monument reflected this understanding of the relationship of God and the state. His design concerns were religious rather than secular in that the quotations were placed on the sides of the monument instead of on its top because, in keeping with his religious belief, these statements were the words of man and thus could not be placed on the same plane with the Word of God. Similarly, he rejected the addition, along side the Ten Commandments monument, of a monument containing Rev. Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, not for secular reasons but because the speech was not "the revealed law of God."

The Ten Commandments monument, as the Chief

Justice made clear both at the unveiling ceremony and at trial, is a granite reminder to Alabama judges and justices and all other state citizens of the ultimate sovereignty of the Judeo-Christian God over both the state and the church, and of how all men and women should, therefore, look to God as the ultimate source of the moral foundation of all the laws of this country; for, it was God, and not man or the state, that gave us the Ten Commandments.

Chief Justice Moore's non-secular purpose is also evident from the monument itself. To be sure, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone v. Graham, 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980) (per curiam). But, as the evidence in this case more than adequately reflected, the Ten Commandments have a secular aspect as well. Experts on both sides testified that the Ten Commandments were a foundation of American law, that America's founders looked to and relied on the Ten Commandments as a source of absolute moral standards. The second tablet, of course, is entirely secular--from "Thou shalt not kill" to "Thou shalt not covet"--but the first tablet also has secular aspects. As the Chief Justice pointed out in his speech unveiling the monument, Samuel Adams gave a speech, the day before the signing of the Declaration of Independence, referring to the King as a false idol, alluding to the Commandment that "Thou shalt have no other Gods before me."

While the secular aspect of the Ten Commandments can

be emphasized, this monument, however, leaves no room for ambiguity about its religious appearance. Its sloping top and the religious air of the tablets unequivocally call to mind an open Bible resting on a podium. While the quotations on the monument's sides are non-Biblical, they still speak solely to non-secular matters, that is, to the importance of religion and the sovereignty of God in our society; these non-Biblical quotations are physically below and not on the same plane with the Biblical one. Further, there is the ineffable but still overwhelming sacred aura of the monument. As the court observed earlier, it was not surprising to learn that visitors and court employees found the monument to be an appropriate, and even compelling, place for prayer. The only way to miss the religious or non-secular appearance of the monument would be to walk through the Alabama State Judicial Building with one's eyes closed.

The monument in the Alabama State Judicial Building is, therefore, dramatically different from other Ten Commandments displays in other government buildings and on other government land across the country. It is different from such displays as: (1) Moses, among other historical lawgivers, holding two blank tablets on the East Portico of the United States Supreme Court Building; (2) a carving of two tablets with the numbers I through X on the entrance door to the United States Supreme Court's courtroom; (3) a pylon in front of the E. Barrett Prettyman Building in Washington D.C. with (among other things) two tablets engraved with Hebrew writing; (4) two blank tablets at the feet of the Spirit of Justice statue in the United States Justice Department Building; and (5) a mural in

the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments. In each of these displays, the Ten Commandments are situated in a secular context and the secular nature of the display is apparent and dominant.

In a mural on the United States Supreme Court building, the Ten Commandments are displayed as two blank tablets, held by Moses sitting amongst many other historical lawgivers. The Commandments displayed on the door to the Supreme Court's courtroom are so small as to be almost unnoticeable, are among many other decorations such as a lion's head and a head of wheat, and are simply two tablets containing the Roman numerals I through X. The Ten Commandments on the pylon in front of the E. Barrett Prettyman building are two small tablets, with part of the Ten Commandments in Hebrew, as part of a larger display representing freedom of religion, freedom of the press, and freedom of speech. On a second side of the pylon are a similar series of carvings representing criminal law and the protections of due process, and on the third side are non-religious excerpts from the Declaration of Independence, the preamble to the Constitution, and the Fifth Amendment. Just as those held by Moses on the United States Supreme Court building, the tablets at the feet of the Spirit of Justice statue in the Department of Justice building, a building closed to the public since at least the late 1970's, are blank. Similar to those on the door to the Supreme Court's courtroom, they are so dominated by their surroundings (in this case, the statue) as to draw little attention. Finally, the mural in the Pennsylvania Supreme Court courtroom is one of many similar murals in that

room, including murals featuring William Blackstone and the Code of Justinian.

The Chief Justice's monument is even different from those Ten Commandments displays found by other courts to violate the Establishment Clause in that the non-secular purpose and appearance of the Chief Justice's monument is much more apparent. For example, in Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768-69 (7th Cir. 2001), cert. denied, 534 U.S. 1162, 122 S. Ct. 1173 (2002), the Seventh Circuit Court of Appeals addressed a monument with the Ten Commandments and Bill of Rights placed side-by-side, designed "to honor our history by reminding society of its core values and to honor our legal tradition since several of our secular laws are parallel to the Ten Commandments." Id. at 771. Similarly, in Books v. City of Elkhart, 235 F.3d 292, 296 (7th Cir. 2000), cert. denied, 532 U.S. 1058, 121 S. Ct. 2209 (2001), the Seventh Circuit confronted a monument with a large version of the Ten Commandments, placed by the Fraternal Order of Eagles, seeking to provide troubled youths with a non-sectarian and non-coercive code of conduct. Id. at 294. This case is not as difficult as those in which the evidence reflected that the Ten Commandments display at issue had an arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion, nor does the evidence support the conclusion that the Ten Commandments were displayed as sort of a secular moral code. The Chief Justice's words unequivocally belie such purposes.

This case, indeed, is unique in that, under not only the

Lemon test, but also under the test proposed by some of Lemon's most vocal critics on the United States Supreme Court, the Chief Justice's placement of the Ten Commandments monument in the Alabama State Judicial Building would be unconstitutional. In County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), Justice Kennedy, writing for himself and Justices Rehnquist and Scalia, two of Lemon's strongest critics, suggested that religious endorsement was not enough to establish an Establishment Clause violation, that there must be more, such as "proselytization" or "coercion." Id. at 660, 109 S. Ct. at 3136-37 (Kennedy, J., concurring in part and dissenting in part). As he explained, "coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition of accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Id. at 661, 109 S. Ct. at 3137.

Justice Kennedy's proselytization test is met here. Both in appearance and in stated purpose, the Chief Justice's Ten Commandments monument is an "extreme case"; it is nothing less than "an obtrusive year-round religious display" installed in the Alabama State Judicial Building in order to "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion," the Chief Justice's religion. Id.

2.

That the Ten Commandments monument's primary effect advances religion is also self-evident. To satisfy the second prong of the Lemon test, the challenged practice must have a "principal or primary effect ... that neither advances nor inhibits religion." Lemon, 403 U.S. at 612, 91 S. Ct. at 2111. In evaluating practices under this prong, the United States Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592, 109 S. Ct. 3086, 3100 (1989). When attempting to define "endorsement," the Court likened it to "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," id. at 593, 109 S. Ct. at 3101 (citation omitted) (emphasis in original), or to "promot[ing] one religion or religious theory against another or even against the militant opposite." Id. (citation omitted).

This endorsement test is objective in nature. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 693-94, 104 S. Ct. 1355, 1370 (1984) (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is ... in large part a legal question to be answered on the basis of judicial interpretation of social facts.") The court's inquiry in this case,

therefore, turns on whether a reasonable observer would perceive the practice in question as endorsing religion. See Allegheny, 492 U.S. at 630, 109 S. Ct. at 3121 (O'Connor, J., concurring).

The parties disagree as to what evidence should be considered by the court in applying the "reasonable observer" standard. The proper application of the endorsement test, and, specifically, what information a "reasonable observer" would possess, was addressed by Justices O'Connor, Stevens, and Scalia in Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 115 S. Ct. 2440 (1995). Justice Stevens would broadly extend the reasonable observer concept "to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement." Id. at 800 n.5, 115 S. Ct. at 2466 n.5 (Stevens, J., dissenting). Justice O'Connor's reasonable observer, on the other hand, would be more informed, "similar to the 'reasonable person' in tort law," and "must be deemed aware of the history and context of the community and forum in which the religious display appears." Id. at 779-80, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment). Finally, Justice Scalia refused to adopt either version of the endorsement test, instead finding it "significant that [in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141 (1993)] we referred only to what would be thought by 'the community'--not by outsiders or individual members of the community uninformed about the school's practice." 515 U.S. at 765, 115 S. Ct. at 2448 (Scalia, J.). Justice Scalia further noted that some uninformed

community members "might leap to the erroneous conclusion of state endorsement. But ... erroneous conclusions do not count." Id. (emphasis in original).

Given Justice Scalia's understanding of Lamb's Chapel, it is evident that the Court generally has considered community perceptions of the challenged practice to be determinative, rather than the perceptions of "some members" or other general observers. Thus, it appears that Justice O'Connor's view of the reasonable observer, who "must be deemed aware of the history and context of the community and forum in which the religious display appears," id. at 780, 115 S. Ct. at 2455, most closely comports with prior Court precedent. As such, the court will consider whether the monument has the impermissible effect of endorsing religion with respect to a "reasonable observer" aware of the history and context of the community and forum in which the monument appears.

For purposes of this case, the import of that awareness is clear. A reasonable observer would know that the Chief Justice ran as the "Ten Commandments Judge" during his campaign for Chief Justice, that the Chief Justice placed the monument in the Judicial Building rotunda to fulfill his campaign promise "to restore the moral foundation of law," and that, as the Chief Justice repeatedly emphasized at the unveiling, the monument "serves to remind ... that in order to establish justice we must invoke 'the favor and guidance of almighty God.'" That reasonable observer would also know that the Judicial Building rotunda is not a public forum, and that other groups may not place their own displays in the rotunda.

On the other hand, the court does not impute to a reasonable observer any knowledge of the Chief Justice's relationship with Coral Ridge Ministries or the numerous speeches, television and radio appearances he has given over the past two years; though, given that the Chief Justice is a state official, that the monument is in a state building, and that the Chief Justice's relationship with Coral Ridge has been open and extensive, a reasonable argument could be advanced that these should be imputed as well. Even with this limited knowledge, however, the court concludes that a reasonable observer would view the monument's primary effect as an endorsement of religion.

As discussed above, the monument's primary feature is the Ten Commandments, an "undeniably ... sacred text," Stone v. Graham, 449 U.S. 39, 41, 101 S. Ct. 192, 194 (1980), carved as tablets into the top of the monument. See Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 772 (7th Cir. 2001) (recognizing additional religious significance when the Commandments are presented as tablet-shaped blocks), cert. denied, 534 U.S. 1162, 122 S. Ct. 1173 (2002). The monument's sloping top and the religious air of tablets unequivocally call to mind an open Bible resting on a podium. While the quotations on the monument's sides are non-Biblical, the fact that they have been edited so as to emphasize the importance of religion and the sovereignty of God in our society fails to diminish, and even amplifies, the ineffable but still overwhelming holy aura of the monument. As the Chief Justice himself stated at the monument's unveiling ceremony, these quotations were not included to serve as "history, [or] historical documents. All history supports the acknowledgment of God.

You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath." No part of the monument itself, nor sign, nor other decoration in the rotunda, in any way emphasizes the potentially secular nature of the Commandments. See, e.g., Allegheny, 492 U.S. at 598, 109 S. Ct. at 3103 (explaining that the effect of a creche, which is capable of communicating a religious message, turns on its setting). Thus, a reasonable observer, viewing this monument installed by the "Ten Commandments Judge" as a whole, would focus on the Ten Commandments, would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity.

The court also finds nothing in "the history of the monument's placement and maintenance as well as the physical characteristics of the monument and of the surrounding area," Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000), that would change the court's view that the monument endorses religion. See also Allegheny, 492 U.S. at 578-87, 109 S. Ct. 3093-99 (discussing the challenged monument, its placement, and the surrounding area). In this case, the Chief Justice installed the monument to fulfill a campaign promise to "restore the moral foundation of law." The monument stands alone in the rotunda, in front of a large picture window with a waterfall in the background, with no other objects to provide a different "focal point" of a viewer's attention. See id. at 598, 109 S. Ct. at 3103 (distinguishing the Court's opinion in Allegheny from

its holding in Lynch because the Lynch display "composed a series of figures and objects, each group of which had its own focal point"). While the rotunda does contain two other plaques, these plaques are much smaller and are over seventy feet away with no sign to indicate that they are connected to or related to the monument in any way. Finally, the rotunda is not an open forum; no other group may install a different monument or plaque in the rotunda without the Chief Justice's permission. Taken together, this history and the physical characteristics of the monument and its surrounding area do nothing to mitigate the monument's effect of endorsing religion, of showing that Christianity is the "favored or preferred" religion of the state of Alabama.

The Ten Commandments monument, viewed alone or in the context of its history, placement, and location, has the primary effect of endorsing religion. As such, the monument violates the second prong of the Lemon test, and it therefore violates the Establishment Clause.[2]

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[2] While not argued by the plaintiffs, the court is concerned that Chief Justice Moore's involvement with Coral Ridge Ministries, a Christian media outlet, violates the third, entanglement prong of the Lemon test. Aside from its being the only media outlet to record the night-time placement of the monument in the Alabama State Judicial Building, Coral Ridge has used the Chief Justice's name and his installation of the Ten Commandments monument to raise funds for not only his defense but also its own evangelical purposes. For example, Coral Ridge uses a picture of the monument to raise money for the Chief Justice's legal defense and, at the same time, to raise money for its own work. A fund-raising letter from Coral Ridge President Dr. James Kennedy included a donor-response form which read, in part, "I want to help provide for Justice Moore's and the Ten Commandments' legal defense. Also, use my gift to continue sharing the life-transforming Gospel,

through new editions of The Coral Ridge Hour and all the ongoing work of Coral Ridge Ministries." In another fund-raising letter, Kennedy wrote, "Please pray and send your most generous possible gift to help us aid in the judge's defense and continue all of the outreaches of the ministry together." Coral Ridge has also used the Chief Justice and the monument as a subject of many of its television and radio programs and has, a number of times, highlighted the Chief Justice's lawsuit in its newsletter "Impact." Coral Ridge even uses the Chief Justice to raise funds on its website: "If you would like to help with the $200,000 Ten Commandments Defense fund and also enable Dr. Kennedy to continue the work of this ministry, send your gift." Additionally, while the Chief Justice is a state official, sued for his placement of a monument in a state building, the State of Alabama is not paying Chief Justice Moore's legal expenses; these expenses are instead being paid by a private source, Coral Ridge.

In a real sense, therefore, the installation of the monument can be viewed as a joint venture between the Chief Justice and Coral Ridge, as both parties have a direct interest in its continued presence in the rotunda. A credible argument could be made that this type of entanglement is specifically the type of "evil[] against which [the] Clause protects ... 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772, 93 S. Ct. 2955, 2965 (1973) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970)).

Admittedly, the Chief Justice denies an active relationship between himself and Coral Ridge. He contends that he has not been involved in the ministry's efforts, through the use of his name and the publicity surrounding the monument, to raise funds for his legal defense in conjunction with efforts to raise funds for its religious projects. But the law recognizes that one cannot escape responsibility for the acts of others, taken on one's behalf, through deliberate ignorance. Jim Walter Res., Inc. v. Allen, 995 F.2d 1027, 1029 (11th Cir. 1993) (holding that deliberate ignorance to the kind of work employee performed would not excuse management from liability for injury employee incurred on the job); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1530 (M.D. Fla. 1991) (finding that employer could not escape liability for hostile work environment by "elect[ing] to bury its head in the sand rather than learn more about the conditions to which female employees ... were subjected"). In a very real way, then, it could be argued

C.

Chief Justice Moore contends that the plaintiffs err in their application of the Lemon test.

1.

The Chief Justice contends that the United States Supreme Court's historical analysis in Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), rather than its test from Lemon, should be applied to determine the outcome of this case. In Marsh, the Court concentrated on the very specific nature of the facts in that case to conclude that the Nebraska legislature's practice of opening each session with a non-sectarian prayer did not violate the Establishment Clause. See Marsh, 463 U.S. at 786, 103 S. Ct. at 3333. Specifically, the Court focused on the fact that

> "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."

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that Coral Ridge's religious activity is being sponsored and financially supported by the Chief Justice's installation of the monument as a government official.

Id. The Court also noted that the Continental Congress itself adopted the procedure of opening its sessions with a prayer, id. at 787, 103 S. Ct. at 3333-34, and found that "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." Id. at 788, 103 S. Ct. at 3334. This "unique history" of legislative prayer was of central importance to the Court in making its decision. Id. at 791, 103 S. Ct. at 3335.

A comparison of Lemon and Marsh, however, reveals that this court need not choose between two competing and mutually-exclusive tests. Thus, the court cannot accept the Chief Justice's argument that the historical analysis from Marsh has replaced the Lemon test in the Supreme Court's Establishment Clause jurisprudence. First, while the Lemon test has been criticized by a number of Supreme Court Justices, Lemon has not been overruled, see Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7, 113 S. Ct. 2141, 2148 n.7 (1993) (noting that Lemon, despite heavy criticism, is still good law), and a clarified (endorsement) version of the Lemon test is still regularly applied by the Court. See, e.g., Zelman v. Simmons-Harris, ___ U.S. ___, ___, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring) ("A central tool in our analysis of cases in this area has been the Lemon test. ... The test today is basically the same as that set forth ... over 40 years ago."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314, 120 S. Ct. 2266, 2282 (2000) ("Lemon ... 'guides

the general nature of our inquiry in this area.'") (citation omitted). The Eleventh Circuit, too, has continued to apply the Lemon test despite this criticism. Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1468 (11th Cir. 1997).

Second, Marsh can be viewed as "an exception to the Lemon test only for such historical practice[s]" as those comparable to legislative prayer. Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829 n.9 (11th Cir. 1989), cert. denied, 490 U.S. 1090, 109 S. Ct. 2431 (1989); see also Marsh, 463 U.S. at 796, 103 S. Ct. at 3338 (Brennan, J., dissenting) (calling Marsh a limited exception to Lemon); but see Allegheny, 492 U.S. at 669-70, 109 S. Ct. at 3142 (Kennedy, J., concurring in part and dissenting in part) (rejecting this view of Marsh). In other words, a practice that fails any one prong of the Lemon test may still be found constitutional under the Marsh exception to the Lemon test. The court therefore need not, as the Chief Justice would have it, choose which of the two cases to apply. Rather, having already found the Chief Justice's installation of the monument to fail the first two prongs of the Lemon test, the court now turns to the question of whether the monument nevertheless can be found constitutional under Marsh.

As discussed above, the United States Supreme Court in Marsh, rather than applying the Lemon test, concentrated on the very specific nature of the facts in that case to conclude that the Nebraska legislature's practice of opening each session with a non-sectarian prayer did not violate the Establishment Clause. Marsh, 463 U.S. at 786, 103 S. Ct. at 3333; see also County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573,

603, 109 S. Ct. 3086, 3106 (1989) ("Marsh plainly does not stand for the sweeping proposition ... that all accepted practices 200 years old and their equivalents are constitutional today."); Edwards v. Aguillard, 482 U.S. 578, 583 n.4, 107 S. Ct. 2573, 2577 n.4 (1987) (noting that Lemon had been applied in all cases, save Marsh, since its adoption); Wallace v. Jaffree, 472 U.S. 38, 63 n.4, 105 S. Ct. 2479, 2493 n.4 (1985) (Powell, J., concurring) (stating that the Marsh holding was "based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'") (citation omitted). The Chief Justice argues that the case at hand has similarly unique facts and should therefore be found constitutional under this exception to the Lemon test.

The Chief Justice contends that, under Marsh, the monument is constitutional because, as he has written in his briefs to the court, "judges throughout our nation's history have acknowledged the moral foundation of law and, indeed, have depended upon it in reaching their decisions." He points to an uninterrupted history, from as early as 1819 to today, in which courts "interacted with, relied upon, or otherwise discussed the moral foundation of the law [in their decisions]." As such, the Chief Justice contends, his reference to "God and to God's law on the monument do not render it unconstitutional." The Chief Justice also argues that the acknowledgment of God made by this monument is no different from the acknowledgments of God appearing on United States currency, in the United States motto, and at the opening of court sessions. Basically, the Chief Justice argues that the monument's acknowledgment of God, like the legislative prayer upheld in Marsh, is part of our

nation's history.

Additionally, the Chief Justice has presented evidence of numerous displays of the Ten Commandments in judicial buildings and other government buildings in Washington, D.C. The Chief Justice argues that the existence of these Ten Commandments displays demonstrate a history of such displays which validate the constitutionality of his own display under Marsh. The most significant of these displays, discussed previously, are: (1) Moses, among other historical lawgivers, holding two tablets on the East Portico of the United States Supreme Court Building; (2) a carving of two tablets with the numbers I through X on the entrance door to the United States Supreme Court's courtroom; (3) a pylon in front of the E. Barrett Prettyman Building in Washington D.C. with (among other things) two tablets carved with Hebrew writing; (4) two blank tablets at the feet of the Spirit of Justice statue in the United States Justice Department Building; and (5) a mural in the Pennsylvania Supreme Court courtroom with Moses carving the Ten Commandments and a full version of the text of the Ten Commandments.

The Chief Justice's first argument, that the monument is constitutional under Marsh because of the historical validation provided by judicial acknowledgment in court opinions of the moral foundation of law, and other governmental acknowledgments of God, is flawed. Even assuming the Chief Justice's contentions are true, that judges in their opinions throughout American history have recognized the moral foundation of law, it does not follow that this monument should

be considered simply as part of that long history of recognition; nor does it follow that this monument is simply one in a long line of governmental acknowledgments of God. First, as discussed previously, the Chief Justice's understanding of the moral foundation of our laws flows from his beliefs that the Judeo-Christian God is the source of the church, the state, and the separation of the two, and, as a matter of not only Biblical text but American law, reigns over both. The Chief Justice has not shown that other judges have recognized this same understanding of the sovereignty of the Judeo-Christian God, and, given the Chief Justice's unique views, the court cannot assume that they did. Second, there is a significant difference between "an obtrusive year-round religious display" installed in the Alabama State Judicial Building in order to "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion," County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 661, 109 S. Ct. 3086, 3137 (1989) (Kennedy, J., concurring in part and dissenting in part), and the discussion of the moral foundation of our laws in a court's opinion, or the ceremonial recognition of God on money or at the opening of court.

Challenges under the Establishment Clause have often turned on subtle but significant differences. A creche standing alone is constitutionally different from a creche incorporated into a larger holiday display, compare id. at 578-79, 109 S. Ct. at 3093 (holding unconstitutional a creche standing alone) with Lynch v. Donnelly, 465 U.S. 668, 687, 104 S. Ct. 1355, 1366 (1984) (finding constitutional a creche incorporated as part of a larger holiday display), and legislative prayer is significantly

different from prayer at a high-school graduation, compare Marsh, 463 U.S. at 795, 103 S. Ct. at 3338 (holding non-sectarian legislative prayer constitutional) with Lee v. Weisman, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661 (1992) (finding prayers at high school graduation to be unconstitutional). Similarly, "ceremonial deisms," such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court," are different from public acknowledgments of a sectarian God. Compare Allegheny, 492 U.S. 630, 109 S. Ct. at 3120-21 (O'Connor, J. concurring) (noting that legislative prayer solemnizes public occasions and expresses hope in the future) with id. at 603, 109 S. Ct. at 3106 (finding an obvious difference between creche displays and references to God in the National Motto and the Pledge of Allegiance). As such, neither an unbroken history of judicial recognition of the moral foundation of law, nor ceremonial acknowledgments of a non-sectarian God, both of which are very different from the Chief Justice's permanent, prominent granite monument to the sovereignty of God, is enough to find the Chief Justice's actions constitutional under the Marsh exception.

Additionally, while the Chief Justice has brought other displays of the Ten Commandments to the court's attention, he has not demonstrated that any of the "unique" circumstances from Marsh exist in this case. First, the Chief Justice has not shown that members of the Continental Congress displayed the Ten Commandments in their chambers, nor that they directly approved of its public display by the government. Second, public, governmental displays of the Ten Commandments,

installed with the purpose of proselytization and having a religious effect, are not "deeply embedded in the history and tradition of this country," Marsh, 463 U.S. at 786, 103 S. Ct. at 3333; indeed, most date from the twentieth century. Thus, the Chief Justice has failed to show that similar displays are common or even generally accepted in this country.

Finally, even if, for the sake of argument, history could be read to support the Chief Justice's contention that Ten Commandments displays in government buildings have been a sufficiently historical part of the fabric of our society, this tradition would fall far short of providing a constitutional basis for the Chief Justice's Ten Commandments monument. No o ther Ten Commandments display presents such an extreme case of religious acknowledgment, endorsement, and even proselytization. In other words, if there is a Ten Commandments display tradition in this country, it is definitely not the tradition embodied by the Chief Justice's monument.

Because no historical background, comparable to that found in Marsh, exists to validate the constitutionality of Chief Justice Moore's Ten Commandments monument, the court finds that the monument is not constitutional under the Marsh exception to the Lemon test.

2.

Chief Justice Moore faults not only the plaintiffs but the United States Supreme Court for failing to understand the historical relationship between God and the state, a relationship he believes to be embodied by the Establishment Clause and

which would allow the presence of his Ten Commandments monument in the Alabama State Judicial Building.

As mentioned above, at trial the Chief Justice explained at length his understanding of the relationship between God and the state. In the Chief Justice's understanding, the Judeo-Christian God is sovereign over both the church and the state in this country, and both owe allegiance to that God. In descriptive terms, God, as the sovereign head, is at the top of a hierarchical vertical triangle; under God are the state and the church, standing next to one another and forming the base of the triangle. The Chief Justice maintains that this understanding of the relationship between God and the state is dictated not only by Biblical text but by the First Amendment itself.

As the Chief Justice explained at trial, relying in large measure on his dissenting opinion in Yates v. El Bethel Primitive Baptist Church, ___ So. 2d ___, 2002 WL 31270278 (Ala. 2002) (Moore, C.J., dissenting), the separation of church and state is "most vividly illustrated by the Old Testament nation of Israel, where institutional lines were drawn so clearly that the chief of state, the king, could not even come from the same family or tribe as the chief ecclesiastical officer, the high priest." Id. at *18. The Chief Justice gave the examples of: "King Uzziah, son of Amaziah, [who] was stricken with leprosy when he presumed upon the role of the priests in burning incense unto the Lord," and "Saul, the first king of Israel, [who] trespassed upon the jurisdiction of the church by making a burnt offering instead of waiting for Samuel, the priest, to perform his

duty." Id. (citing II Chronicles 26:16-21 (King James); I Samuel 13:13-14 (King James)). Thus, the Bible dictates the Chief Justice's understanding of the relationship between God and the state because, "While both the priest and the king were under the law of God, the role of civil government was separated from the worship of God." Id. Jesus, too, according to the Chief Justice, explicitly recognized this separation when he said "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Id. (citing Matthew 22:21 (King James)).

The Chief Justice also believes that his specific understanding of the relationship between God and the state is embodied by the First Amendment. The Chief Justice quotes Thomas Jefferson's "Bill For Establishing Religious Freedom," "that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain," El Bethel, ___ So. 2d ___, 2002 WL 31270278, *17 (emphasis added by the Chief Justice), for the proposition that "even Thomas Jefferson recognized that a separation between church and state existed because 'Almighty God' was sovereign over both institutions." Id. The Chief Justice also quotes James Madison's "Memorial and Remonstrance": "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ..." Id. at *22 (quoting II The Writings of James Madison 184-85 (Gaillard Hunt, ed., G.P. Putnam's Sons 1901). This

language leads to the Chief Justice's conclusion that "Madison explicitly recognized that maintaining a 'separation' in no way meant to separate from civil government a belief in the sovereignty of God. Indeed, the very concept of separation mandates a recognition of a sovereign God." Id. at *21. The Chief Justice uses these examples from Jefferson and Madison, as well as earlier examples in English history, to support his belief "that the recognition of the sovereignty of God is the very source of the principle of the separation of church and state." Id. at *22.

Indeed, in the Chief Justice's view, it is the Judeo-Christian God, through the Biblically dictated separation of church and state, who gives Americans the freedom of conscience to believe in whatever faith they choose. Americans are free to worship other Gods only because the Judeo-Christian God, and the Judeo-Christian God alone, allows for freedom of conscience. Because all other Gods, in the Chief Justice's view, do not allow for freedom of conscience, we, as Americans, would not have such freedom if another God were placed over the church and state under our governmental framework.[3]

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[3] Some might disagree, even strongly, with the Chief Justice's view that other, non-Judeo-Christian, Gods are not tolerant, and that the Judeo-Christian God, at least as the Judeo-Christian God has been understood over the centuries, is tolerant. As one legal scholar has put it,

> "The Western religions--Christianity, Judaism, and Islam--all rest on principles discouraging or even forbidding coercion in persuading nonbelievers to believe. These principles, to be sure, have often been honored in the breach, although a good deal less often than some may think. Even the Inquisition, to take a prominent example,

The court appreciates that, as a matter of conscience, one may believe that the Judeo-Christian God is sovereign over the state. In fact, the court understands that it is just this type of belief that the Free Exercise clause and the Establishment Clause are meant to protect. Thus, the court stresses that it is not disagreeing with Chief Justice Moore's beliefs regarding the relationship of God and the state. Rather, the court disagrees with the Chief Justice to the extent that it understands him to be saying that, as a matter of American law, the Judeo-Christian God must be recognized as sovereign over the state, or even that the state may adopt that view. This is an opinion about the structure of American government, rather than a matter of religious conscience, that the court feels fully comfortable refusing to accept.

As an initial matter, the court understands how, if it were to adopt the Chief Justice's understanding of the First Amendment as a matter of law, his placement of the monument in the Alabama State Judicial Building would not violate the Establishment Clause. Under the Chief Justice's view, the Judeo-Christian God is the real, and even divine, source for the

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> was never aimed at nonbelievers, only at Christians considered heretics. Most Eastern religions, too, abhor coercion and violence. The fact, for example, that violence has often marked the politics of predominantly Buddhist Sri Lanka does not alter the fundamental nonviolent teaching of that tradition. It means only that the teaching of Buddhism, like similar teachings in other faiths, is sometimes disobeyed by morally frail humans."

Stephen L. Carter, God's Name in Vain 158 (2000).

separation of church and state under the First Amendment. As such, that God, or the belief in that God, cannot be separated from the state, and must not be separated from the state lest we lose our freedom of conscience to worship as we choose; the church as an entity is all that must be separated from the state. Because the Chief Justice's Ten Commandments monument is not a church, and does not coerce people into worshiping God in a certain manner, it does not violate the Establishment Clause as the Chief Justice understands it.

The court, however, rejects the Chief Justice's suggested legal understanding of the relationship between God and the state for a number of reasons. First and foremost, the Chief Justice's belief that American law embraces the sovereignty of God over the state has no support in the text of the First Amendment. The First Amendment simply states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Nowhere does the Constitution or the First Amendment recognize the sovereignty of any God, Judeo-Christian or not, or describe the relationship between God and the state. In fact, this country's founding documents support the idea that it is from the people, and not God, that the state draws its powers. As every American schoolchild knows, the Declaration of Independence states that "governments are instituted among Men, deriving their just powers from the consent of the governed," and the Constitution begins with that immortal phrase, "We the People of the United States, in Order to form a more perfect Union ... do ordain and establish this Constitution for the United States of America." Hence, the Chief Justice has no textual support, in

either the Constitution as a whole or the First Amendment itself, for his legal understanding of the relationship between God and the state, and the court must therefore reject that understanding. Second, the Chief Justice's understanding of this relationship has no support in Supreme Court law. No Supreme Court decision and, the court believes, no Supreme Court justice, has suggested that the First Amendment itself actually incorporates the notion of a Judeo-Christian God as the sovereign head of this nation. The First Amendment does not elevate one religion above all others, but rather it places all religions on par with one another, and even recognizes the equality of religion and non-religion. See Allegheny, 492 U.S. at 590, 109 S. Ct. at 3099 ("Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 52, 105 S. Ct. 2479, 2487 (1985)). The Chief Justice's understanding of the First Amendment, however, would discriminate among religions; in fact, it would recognize only Christianity as a "religion" and would relegate Hinduism or Islam, among others, to the lesser status of "faith." Roy S. Moore, Religion in the Public Square, 29 Cumb. L. Rev. 347, 356-57 (1998/1999) ("By leaving religion undefined, the Court has opened the door to the erroneous assumption that, under the Establishment Clause, religion could include Buddhism, Hinduism, Taoism, and whatever might occupy in man's life a place parallel to that filled by God, or even Secular Humanism, which might be defined as man's belief in his own supremacy and sufficiency.").

At trial, the Chief Justice reiterated his belief that only Christianity meets the First Amendment definition of religion, and repeatedly called any other creed a "faith," rather than a religion. As such, the court must also reject the Chief Justice's legal understanding of the First Amendment concept of religion for its lack of support in Supreme Court precedent.

To be sure, some Justices have been more tolerant than others of state "acknowledgment" of various religions; but none has gone so far as to say that the state should or even may acknowledge one religion—that is, Christianity--as the basis on which all other religious faiths are free to worship as they choose. Were the state to do so, it would be engaging in proselytization on behalf of a particular religion, which even those Justices who read the Establishment Clause more narrowly would prohibit. See, e.g., Allegheny, 492 U.S. at 661, 109 S. Ct. at 3137 (Kennedy, J., concurring in part and dissenting in part) (stating that the display of a large Latin cross on the roof of city hall would violate the Establishment Clause because it "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"). By adopting, as a matter of law, the view that the Judeo-Christian God is the authority behind the First Amendment, the state would also be embracing a particular religion, again in complete violation of the Establishment Clause. See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 401, 113 S. Ct. 2141, 2151 (1993)(Scalia, J., concurring) ("I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not

signify state or local embrace of a particular religious sect."). Even under the most narrow readings of the Establishment Clause, then, while the Chief Justice is free to keep whatever religious beliefs he chooses, the state may not acknowledge the sovereignty of the Judeo-Christian God and attribute to that God our religious freedom.

Third, the court notes that it is hard to separate the Chief Justice's religious beliefs--that he may possess as a matter of conscience--from his legal beliefs--that the court must disagree with--because the Chief Justice's legal understanding of the relationship between God and the state is identical to his religious understanding of that relationship. Indeed, his monument-unveiling speech in the Alabama State Judicial Building would have been as (if not more) appropriate as a Ten Commandments monument-dedication ceremony in a church. One could easily imagine an evangelist preacher giving a sermon about the "truth ... that in order to establish justice, we must invoke 'the favor and guidance of Almighty God,'" and ending with his hope that "this day [may] mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land." The Chief Justice's understanding of the relationship between God and the state comes uncomfortably too close to the adoption of "a government of a state by the immediate direction or administration of God." Webster's Third New International Dictionary 2370 (1976), that is, a "theocracy," albeit in the Chief Justice's mind a tolerant one. The court must unequivocally reject the adoption of an approach that could lead to that outcome.

3.

Chief Justice Moore contends that the plaintiffs, and even the United States Supreme Court, have failed to give an appropriate definition of religion; he maintains that an Establishment Clause challenge cannot be resolved with fidelity to the original intent of the framers without adopting a definition of the word "religion" that comports with his understanding of the Establishment Clause.

By the Chief Justice's definition, as stated at trial in reference to his law review article, "religion" means nothing more than "the duties we owe to our Creator and the manner of discharging those duties." Hon. Roy S. Moore, Religion in the Public Square, 29 Cumb. L. Rev. 347, 352 (1998/1999). Relying on this definition, the Chief Justice views the Establishment Clause as simply preventing government from establishing the duties one owes to God and the manner of discharging those duties. This understanding, according to his testimony at trial, "is derived from the Judeo-Christian view of the sovereignty of God, not the Buddhist view of God or the Hindu view of God, or the Taoist view of God, or the secular humanist view of God." Similarly, the Chief Justice has written that,

> "By leaving religion [seemingly] undefined, the [Supreme] Court has opened the door to the erroneous assumption that, under the Establishment Clause, religion could include Buddhism, Hinduism, Taoism, and whatever

> might occupy in man's life a place parallel to that filled by God ... In such a case, God and religion are no longer distinguished in meaning, permitting the First Amendment to be used to exclude the very object it was meant to protect, namely the sovereignty of God over civil government."

Id. at 356-57.[4] In short, his definition of religion would permit the First Amendment to do what he believes it was intended to do: "to protect ... the sovereignty of God over civil government," id., and sovereignty of the Judeo-Christian God only.[5]

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[4] At trial, the Chief Justice testified that he would add the word "seemingly" to this statement from his law review article.

[5] While the court agrees with the Chief Justice that an understanding of "religion" for First Amendment purposes must constitute more than just the acknowledgment of God, it is not inclined to agree with his semantic distinction between "faith" and "religion." In Webster's Third New International Dictionary 816 (1976), "faith" is defined as "1(a): the act or state of wholeheartedly and steadfastly believing in the existence, power, and benevolence of a supreme being ...; belief and trust in and loyalty to God; (b)(1): an act or attitude of intellectual assent to the traditional doctrines of one's religion; orthodox religious belief." In that dictionary, id. at 1918, "religion" is defined as "1: the personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp[ecially] as founded in accepted sacred writings or declared by authoritative teachers, a way of life recognized as incumbent on true believers, and typically the relation of oneself to an organized body of believers."

Under these definitions, Muslims, for example, would call Islam both their "faith" (they believe in the existence of a supreme being) and their

The court, for several reasons, rejects the Chief Justice's invitation to define the term "religion." First and foremost, to adopt the Chief Justice's definition of religion would be to reject explicitly the precedent established by a number of Supreme Court cases, from Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947), to Zelman v. Simmons-Harris, ___ U.S. ___, 122 S. Ct. 2460 (2002), which would have been decided differently under the Chief Justice's proposed definition. Without cataloguing the many cases that would be resolved differently given the Chief Justice's definition of religion, the court will discuss a number of examples to illustrate this point.

Under the Chief Justice's definition of religion, religious display cases, such as County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086 (1989), would be decided differently. In Allegheny, the court found unconstitutional the display of a creche in a government

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"religion" (they have a personal commitment to a God). Under the Chief Justice's understanding and definition of religion, however, Islam is not a "religion," even though it clearly prescribes duties owed to the Creator and the manner of discharging those duties, but it is a "faith." Islam is not a religion under the Chief Justice's views because Muslims do not worship the Judeo-Christian God. While Muslims have a personal commitment to a God, they do not have a personal commitment to the God of the founders; or, using the Chief Justice's definition of religion, Muslims owe duties to their creator and have ways of discharging those duties, but they do not owe the same duties to their creator nor do they have the same manner of discharging those duties as the founders. The court cannot accept a definition of religion that would lead to such a conclusion.

Indeed, the Chief Justice's definition of religion proves, if anything, that it is unwise, and even dangerous, to put forth, as a matter of law, one definition of religion under the First Amendment.

building, id. at 579, 109 S. Ct. at 3093, an outcome that would certainly change if the Establishment Clause prohibited no more than an Establishment of "the duties we owe to our Creator and the manner of discharging those duties." School prayer cases, too, such as Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985), or Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), would be resolved differently. In Wallace, the Court found unconstitutional a statute designed to return voluntary prayer to schools, 472 U.S. at 61, 105 S. Ct. at 2492; in Santa Fe, the Court found unconstitutional a policy of student-led prayer before football games, 530 U.S. at 317, 120 S. Ct. at 2283. Again, under the Chief Justice's limited definition of religion, both of these cases would have been decided differently as voluntary prayers cannot establish "the duties we owe to our Creator and the manner of discharging those duties."

By adopting the Chief Justice's definition, then, the court would not only be deciding this case, but would be implicitly overruling a number of Supreme Court cases. This it cannot do: the court is strictly bound by Supreme Court precedent; only that Court has the ability to overturn its previous decisions. See, e.g., Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir. 1983) ("Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded. ... If the Supreme Court errs, no other court may correct it."), aff'd, 472 U.S. 38, 105 S. Ct. 2479 (1985); see also Hutto v. Davis, 454 U.S. 370, 375, 102 S. Ct. 703, 706 (1982)

("But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Under current Supreme Court precedent, this court simply must decide on which side of the Establishment Clause "barrier," Lemon, 403 U.S. at 614, 91 S. Ct. at 2112, the Chief Justice's installation of the monument falls. It need not, and in fact cannot, accept the Chief Justice's definition of the word "religion" because, by doing so, the court would implicitly overrule a number of Supreme Court decisions.

Second, the court cannot accept the Chief Justice's proposed definition of the word "religion" because it is, simply put, incorrect and religiously offensive. The court cannot accept a definition of religion that does not acknowledge Buddhism or Islam as a religion under the First Amendment, and would in fact directly violate Supreme Court precedent by doing so. See Allegheny, 492 U.S. at 590, 109 S. Ct. at 3099 ("Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace, 472 U.S. at 52, 105 S. Ct. at 2487).

Finally, the plaintiffs have not presented an alternate definition of religion, and the court lacks the expertise to formulate its own definition of religion for First Amendment purposes. Therefore, because the court cannot agree with the

Chief Justice's definition of religion and cannot formulate its own, it must refuse the Chief Justice's invitation to define "religion."

4.

Noting that the Establishment Clause provides that government "shall make no law respecting an establishment of religion," Chief Justice Moore contends that the plaintiffs' challenge to the monument must fail because there is no "law" at issue here. The Chief Justice asserts that, although he put the monument in the Judicial Building as a state actor, his actions did not constitute a "law" or "law-making" for Establishment Clause purposes. The court cannot agree.

The Chief Justice placed the monument in the Judicial Building Rotunda under his authority as administrative head of Alabama's judicial system. Ala. Const. amend. 328, § 6.10 (administration); Ala. Code § 41-10-275 (1975) (leases). His placement of the monument therefore has the force of law. The Chief Justice is the only person with the authority to place the monument or remove it, authority given to him by the laws of Alabama. To say that his actions in placing the monument in the Alabama Judicial Building does not constitute a "law" obfuscates the truth of the situation: the monument was placed in the Judicial Building by a state official, acting in his official state capacity, under powers granted to him by state law. Cf. Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655 (1992) ("A school official, the principal, decided that an invocation and a benediction should be given; this is a choice

attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."). Indeed, in the Chief Justice's understanding, the Alabama Constitution affirmatively requires him to have put the monument in the rotunda. At trial, he testified: "Well, first I am pleased to present this monument. What pleased me is the fact that it represented my duty under the Constitution of the State of Alabama ... [which] says that I shall take affirmative and appropriate action to correct and alleviate any condition or situation in the administration of justice...."

Because the Chief Justice placed the monument in the Alabama State Judicial Building in his official capacity, under the authority of Alabama law, its placement falls well within the Establishment Clause's purview.

5.

Chief Justice Moore contends that the plaintiffs, in their application of Lemon, fail to draw a distinction between motive and purpose, thereby conflating his permissible "purpose" for installing the monument with his irrelevant "motive" for its installation. An example may help to elucidate this difference: if a legislator voted to support a bill to build a highway through his district, his purpose would be simply to build a highway, no matter what his underlying motive (to create jobs, please voters, etc.) may have been. The Chief Justice argues that only evidence of his purpose in erecting the monument may be considered by the court. While the court finds that the Chief Justice's distinction between "motive" and "purpose" has

potential merit, that distinction is not determinative in this case.

The Supreme Court, in Board of Education v. Mergens, 496 U.S. 226, 249, 110 S. Ct. 2356, 2371 (1990) (holding the Equal Access Act requires school to allow a religious group equal access to school facilities and that the Act does not violate the Establishment Clause as so construed), provides some support for the distinction between purpose and motive: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted [it]." (Emphasis in original). Justice O'Connor's concurrence in Wallace v. Jaffree, 472 U.S. 38, 74-75, 105 S. Ct. 2479, 2499 (1985) (finding statutes providing for voluntary school prayer unconstitutional), also instructs on the scope of the court's inquiry into the Chief Justice's intent. In Wallace, Justice O'Connor said the purpose inquiry should be deferential and limited, and, if a secular purpose behind a statute is plausible, the court should look only at the statute on its face, its official legislative history, or its interpretation by a responsible administrative agency. Id.

While the court agrees with the Chief Justice that there is a difference between motive and purpose, it finds that difference to be less pronounced (and therefore less identifiable) when a single individual, as opposed to a group of individuals such as an entire legislature, is responsible for the challenged practice. And the difference is even more pronounced when the challenged practice is not a written statute.

In making a distinction between purpose and motive, the Mergens Court distinguished between the professed purpose of a statute, as embodied by its text, and the motivations of individual legislators in drafting or voting for the statute. Mergens, 496 U.S. at 249, 110 S. Ct. at 2371. In the present case, the "law" in question is really an action taken by Justice Moore. In determining the purpose of that action, the court must consider the reasoning of the person who took it. Unlike a statute, the purpose of which can be analyzed with reference to available written materials and without reference to the individual motivations of legislators, the purpose of Justice Moore's action can only be understood with respect to his own reasoning in taking it. Therefore, the distinction between motive and purpose in this case is much more of an artificial construct than it is in cases involving challenges to written laws.

For example, the court cannot fully accept the Chief Justice's argument that his speech unveiling the monument shows his "purpose" (because he was wearing his Chief Justice "hat" during that speech), while an interview he gave just over one month later with Dr. James Kennedy of Coral Ridge Ministries shows his "intent" (because he was wearing his individual "hat" during that interview).[6] Surely, the Chief Justice (and, in particular, when he is acting as Chief Justice Moore, the legal and administrative head of the State of Alabama) does not think that speeches are not a part of his duties as a Justice. To accept such a distinction would raise

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[6] The court has an especially difficult time with this distinction here because of the extent to which the Chief Justice's religious views control his understanding of the structure of government. See infra, part II(C)(3).

many difficult line-drawing issues as to when, exactly, a government actor is speaking in his individual capacity and when he is speaking in his professional capacity. For example, when the Chief Justice helped to install the monument on the night of July 31, 2001, was he doing so in his individual capacity or his capacity as Chief Justice? This distinction is complicated by the fact that the Chief Justice suggested at trial that Moore, the individual, gave the monument to Moore, the Chief Justice. The Chief Justice has proposed no objective criteria to help the court differentiate between the two.

The court, however, need not and therefore will not decide the ramifications of the difference between "motive" and "purpose" in this case. It is sufficient for present purposes to recognize that a court looking at "purpose" in an Establishment Clause case may look beyond the stated legislative purpose. As the Supreme Court has explained, "[i]n applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985) (emphasis added) (citations omitted); accord Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'") (citations omitted). While this statement is not particularly elucidating as to the difference between motive and purpose, it does make it clear that the court must look beyond the Chief Justice's stated

purpose to his actual purpose. For example, in Jaffree, the Court specifically examined evidence of the legislative intent contained in the legislative record and the testimony of the challenged bill's sponsor. 472 U.S. at 58, 105 S. Ct. at 2490.

Additionally, the Chief Justice has admitted that certain statements he has made, beyond his oft-repeated statement that the monument was installed "to restore the moral foundation of law," are indicative of his purpose for installing the monument. Specifically, the Chief Justice admits that the speech he gave at the monument's unveiling, various answers he gave in his deposition, and, of course, portions of his trial testimony are evidence of his purpose. The Chief Justice does argue, however, that many of the plaintiffs' other evidentiary submissions constitute evidence of motive and therefore should not be considered by the court in determining the constitutionality of his installation of the monument. These include all evidence relating to following:

> (1) His campaign for Chief Justice: the Chief Justice's campaign referred to him as the "Ten Commandments Judge" and almost everything distributed by the campaign referenced the Ten Commandments. Additionally, the Chief Justice sent a thank-you note to campaign contributors reading, in part, "It is our hope that next year at this time, the Ten Commandments will be displayed in the Alabama Supreme Court, and the acknowledgment of God will be permitted and encouraged in all Alabama public forums under then Chief Justice Moore's leadership."

(2) Interviews he has given on TV and radio: For example, on a segment entitled "One True God," aired by Coral Ridge Ministries as part of a television program in October 2001, the Chief Justice discussed the "long, continuous battle that I have fought over acknowledging God. ... I have put the monument depicting the sovereignty of God and his standards in the Judicial building. And I have no intention of removing them. We will defend it, because it is truth, and you can't deny truth."

(3) His relationship with Coral Ridge Ministries: the Chief Justice has appeared on a number of television and radio programs created by Coral Ridge.

(4) Speeches he has given at different rallies: For example, after he was elected Chief Justice, the Chief Justice appeared at a rally in Tennessee on December 2, 2001, in which he gave a speech stating, in part, that "God gave us our rights; government is to secure it. If it doesn't--if it denies God, it should be abolished."

The plaintiffs, on the other hand, argue that these public statements should be considered by the court in assessing both the Chief Justice's purpose for installing the monument and the effect the monument will have on a reasonable observer.

The court will not resolve this dispute, however, because it is clear from the Chief Justice's trial testimony, as well as the evidence that he concedes reflects his purpose, that he erected the monument with an improper purpose. As such, the court need not resolve the distinction between purpose and

motive, nor need it decide which of the Chief Justice's statements are properly considered by the court in determining his purpose under the Lemon test. Rather, in finding the Chief Justice's purpose unconstitutional, the court has limited its consideration to the speech given by the Chief Justice at the monument's unveiling, the Chief Justice's trial testimony and trial exhibits discussed in parts II(B) and II(C)(1) of this opinion, and the monument itself. The Chief Justice admits that this evidence should be considered to determine his purpose in erecting the monument, and Supreme Court precedent shows that this evidence is properly considered by the court. See Jaffree, 472 U.S. at 58, 105 S. Ct. at 2490.

III.

The court appreciates that there are those who see a clear secular purpose in the Ten Commandments, for they command not only such things as "I am the Lord thy God" and "Thou shalt have no other Gods before me" but also, among other things, that "Thou shalt not kill" and "Thou shalt not steal," and that we should "Honour thy father and thy mother." If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational importance (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different case before it. But the Chief Justice did not limit himself to this; he went far, far beyond. He installed a two-and-a-half ton monument in the most prominent place in a

government building, managed with dollars from all state taxpayers, with the specific purpose and effect of establishing a permanent recognition of the "sovereignty of God," the Judeo-Christian God, over all citizens in this country, regardless of each taxpaying citizen's individual personal beliefs or lack thereof. To this, the Establishment Clause says no.[7]

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[7] In Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141 (1993), Justice Scalia comments on the "strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general." 508 U.S. at 400, 113 S. Ct. at 2151 (Scalia, J., concurring).

With deeper reflection, however, this "notion" may not be so "strange." It is generally accepted that, at the time of the framing of the Constitution, this country was predominantly Christian, and it appears that Christianity was not merely tolerated but viewed as essential to this country's democratic success. George Washington, Farewell Address (September 1796) ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."); Alexis De Tocqueville, Democracy in America 445 (George Lawrence trans., J.P. Mayer ed., Perennial Classics 2000) ("Religious nations are therefore naturally strong on the point on which democratic nations are weak; this shows of what importance it is for men to preserve their religion as their conditions become more equal."). Thus, it makes sense that something viewed at the time as so essential as was religion would be given "preferred treatment" by being addressed in the First Amendment to the United States Constitution. But what history also taught at that time was that religion, and particularly Christianity, made this contribution working as a private institution and outside the framework of formal government. Alexis De Tocqueville, Democracy in America 47 (George Lawrence trans., J.P. Mayer ed., Perennial Classics 2000) ("Religion, being free and powerful within its own sphere and content with the position reserved for it, realized that its sway is all the better established because it relies only on its own powers and rules men's hearts without external support."). Indeed, this same history taught that when government interfered with religion, religion (and, in particular, Christianity) suffered. This is evidenced by the many instances in which

The plaintiffs ask that the court enter an injunction requiring Chief Justice Moore to remove his Ten Commandments monument forthwith. The court declines to enter such an injunction at this time. Instead, the court will enter a declaration that Justice Moore's placement of his Ten Commandments monument in the Alabama State Judicial Building was unconstitutional, and will allow Justice Moore thirty days to remove it. If the monument is not removed within thirty days, the court will then enter an injunction requiring Justice Moore to remove it within fifteen days thereafter.

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered

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people have been persecuted for their religious beliefs, well-known to anyone who has studied American History.

Thus, the First Amendment gave "preferred treatment" to religion, and, in particular, to Christianity, by assuring that there would be no governmental interference with, including even "endorsement" of, it. In other words, as indeed history has shown, Christianity flourishes best when it is left alone by government. So, it could be argued that, because this country began as a Christian nation, the First Amendment's ban on government interference with religion in general has actually encouraged the flourishing of not just religion but Christianity in particular. Whether the founders in framing the First Amendment intended this (this is, to foster Christianity specifically), the court cannot say, for it lacks adequate historical expertise; but it is an interesting question.

today, it is the ORDER, JUDGMENT, and DECREE of the court that:

(1) Judgment is entered in favor of plaintiffs Stephen R. Glassroth, Melinda Maddox and Beverly Howard, and against defendant Roy S. Moore.

(2) It is DECLARED that defendant Moore's placement of his Ten Commandments monument in the Alabama State Judicial Building violated the Establishment Clause of the First Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment and enforced by 42 U.S.C.A. § 1983. Defendant Moore is given thirty days from the date of this judgment to remove the monument.

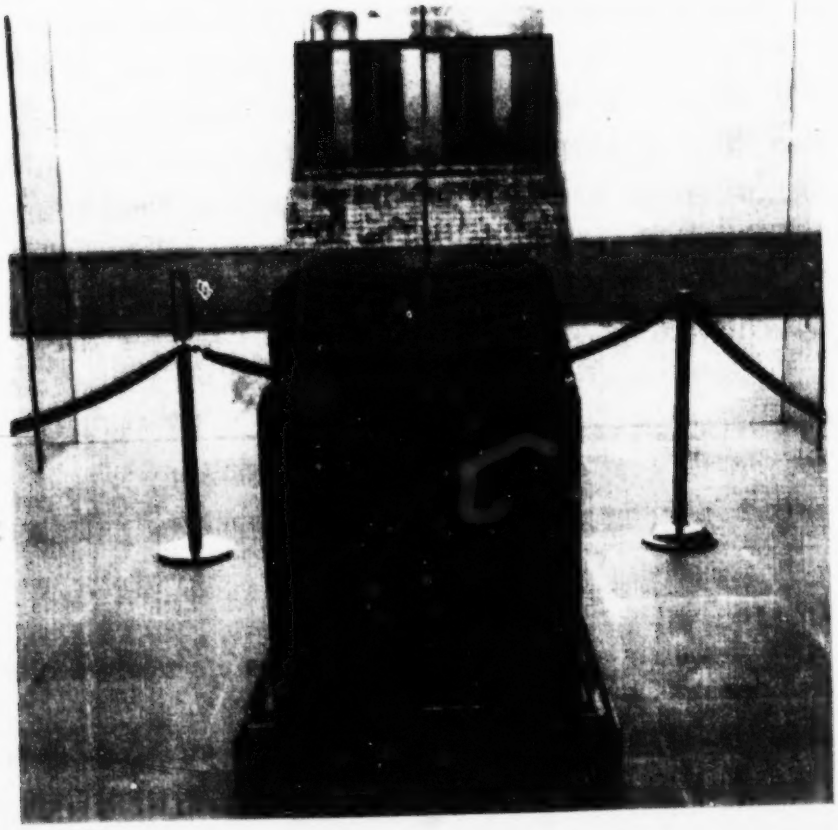
The court retains jurisdiction to impose and enforce an injunction should one become necessary.

It is further ORDERED that costs are taxed against defendant Moore, for which execution may issue.

DONE, this the 18th day of November, 2002.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX A
The Ten Commandments Monument



APPENDIX B

Quotations inscribed on the monument's four sides

Front (North) side

"Laws of nature and of nature's God"--Declaration of Independence

"The laws of nature are the laws of God, whose authority can be superseded by no power on earth"--George Mason [Taken from arguments submitted by George Mason in Robin v. Hardaway, 2 Va. Reports (Jeff.) 109, 114 (Va.1772)]

"The transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed"--James Madison [Taken from The Federalist No. 43, at 295]

"This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; ... upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these"--William Blackstone [Taken from Volume I of The Commentaries of the Law of England, "Of the Rights of Persons," at 41 (1765)]

Right (West) side

"In God We Trust"--National Motto

"We, the people of the state of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of almighty God, do ordain and establish the following constitution and form of government for the state of Alabama"--Constitution of Alabama

"O thus be it ever when freemen shall stand between their lov'd home and the war's desolation! Blest with vict'ry and peace may the heav'n rescued land praise the power that hath made and preserv'd us a nation! Then conquer we must, when our cause it is just, and this be our motto--'in god is our trust,' and the star-spangled banner in triumph shall wave o'er the land of the free and the home of the brave"--National Anthem

Back (South) side

"So help me God"--Judiciary Act of 1789

"Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?"--George Washington [Taken from Washington's Farewell Address of 1796]

"The greater part of evidence will always consist of the

testimony of witnesses--this testimony is given under those solemn obligations which an appeal to the God of truth impose; and if oaths should cease to be held sacred, our dearest and most valuable rights would become insecure"--John Jay [Taken from John Jay's charge to the grand jury of the circuit court for the district of Vermont on June 25, 1772, at 284]

Left (East) side

"One nation under God, indivisible, with liberty and justice for all"--Pledge of Allegiance 1954

"The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our government upon the moral directions of the creator"--Legislative History [Taken from the House Report of legislation adopting the Pledge of Allegiance, at 2340]

"Human law must rest its authority ultimately upon the authority of that law which is divine"--James Wilson [Taken from Volume I of The Works of the Honourable James Wilson, at 104-05 (Bird Wilson ed. 1804)]

"And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of god? That they are not to be violated but with his wrath?"--Thomas Jefferson [Taken from Notes on the State of Virginia, at 169]

APPENDIX C

Speech by Justice Moore at monument's unveiling ceremony

First, let me thank you for your attendance here today. We appreciate you coming, and some of you have come from great distances. I thank Mr. Parker, my legal advisor in the Administrative Office of Courts, for that introduction.

By the authority vested in me by the Constitution of the State of Alabama as Chief Justice of the Alabama Supreme Court, as administrative head of the judicial system of this state, by the authority vested in me by Section 41-10-275 as Chief Justice, as the authorized judicial representative of the Unified Judicial System, and finally by the authority vested in the Chief Justice as the authorized representative under the lease of this building in which you stand, I'm pleased to present this monument depicting the moral foundation of our law and hereby authorize it to be placed in the rotunda of the Alabama Judicial Building.

It is altogether fitting and proper that we should do this. By placement of this monument in the rotunda housing the Alabama Supreme Court, the Alabama Court of Criminal Appeals, the Alabama Court of Civil Appeals, the Alabama State Law Library, and the Alabama Administrative Office of Courts, this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, the members of the bar who appear before them, as well as the people who visit the Alabama Judicial Building, of the truth

stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."

"The institutions of our society are founded on the belief that there is an authority higher than the authority of the State, that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator which government must respect. The Declaration of Independence stated the now familiar theme, We hold these truths to be self- evident, that all men are created equal, that they're endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. In the body of the Constitution as well as the Bill of Rights is enshrined these principles."

Some of you might think the words that I just spoke are my words, carefully structured to fit my own ends; or perhaps a quote from a past long ago, but certainly not true or relevant to our law today. On the contrary, those words are not my words, they're not an ancient quote relevant to law. They're the words of Justice William O. Douglas in 1961 in the case of McGowan v. Maryland.

But today, a mere forty years later, many judges and other government officials across our land deny that there's a higher law. They forbid teaching your children that they're created in the image of Almighty God, and that while they purport all the while that it is government and not God who gave us our rights. Not only have they turned away from those

absolute standards which form the basis of our morality and the moral foundation of our law, but they have divorced the Constitution and the Bill of Rights from these principles. As they have sown the wind, so we have reaped the whirlwind, in our homes, in our schools and in our workplaces.

When I ran for the office of Chief Justice of the Alabama Supreme Court, I made a pledge to restore the moral foundation of law. It is axiomatic that to restore morality, we must first recognize the source of that morality. From our earliest history in 1776, when we were first pleased to be called the Untied States of America, our forefathers recognized the sovereignty of God.

As late as 1954, the United States Congress placed in our Pledge of Allegiance the word "under God," and said the inclusion of God in our pledge, therefore, would further acknowledge the dependence of our people and our government upon the moral directions of the Creator. Judges, legislators, and executive officers around our country have, since our nation's birth, consistently pledged under oath, "so help me God," to uphold the Constitution.

Immediately after my election in November of 2000, I contacted Mr. Richard Hahnemann, an accomplished sculptor, to assist me in the construction and design of this monument. Based upon my specifications, he worked, together with myself and my legal assistant and attorney, Mr. Stephen Melchior, for the past eight months to complete this project.

I would like to point out that no tax funds are used in the construction or installation, which was accomplished last evening so as not to conflict with this workplace. I would like to recognize Clark Memorial of Birmingham, Mr. Pierre Tourney, Sr., Mr. Pierre Tourney, Jr., for their help in the construction, design and installation, as well as the transportation of this monument to this building.

And what an appropriate date this is. For it was on August 1st of 1776, exactly 225 years ago today, that Samuel Adams, the father of the American Revolution, stood before a rather large crowd at the Philadelphia State House. And on its steps, he delivered a speech prior to the formal signing of the Declaration of Independence on August 2nd of 1776. He began by stating, "We have explored the temple of royalty and found that the idol that we have bowed down to has eyes which see not, ears that hear not our prayers, and a heart like the nether millstone."

Today a cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded and for those simple truths which our forefathers found to be self-evident; but once again, we find that those cries have fallen upon eyes that have seen not, ears that hear not our prayers, and hearts much like that nether millstone.

Samuel Adams concluded his remarks by saying, "We have this day restored the Sovereign, to whom alone all men ought to be obedient. He reigns in Heaven and with a propitious eye beholds his subjects assuming that freedom of thought and

dignity of self-direction which he bestowed upon them. From the rising to the setting sun, may His kingdom come." And may this day mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land.

This monument, ladies and gentlemen, tells a story. If you look to the front, you'll see on the inset, "The Laws of Nature and of Nature's God." It was on those laws, the will of the Maker, upon which the Declaration of Independence was premised and upon which the Constitution was predicated.

James Madison, for example, the chief architect of the Constitution, said we were entitled to have a constitution because of the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.

They knew the law. The law was clearly written by Sir William Blackstone, which was the law of this country for many, many decades. He said, "This law of nature, being co-eval with mankind and dictated by God himself, is, of course, superior in obligations to any other. It is binding over all the globe in all countries and at all times, and no humans laws are of any validity if contrary to this." This law of nature and the law of revelation pin all human laws on these two foundations.

On each side of this monument, you'll see quotes from various presidents. For example, George Washington, on the back, said, "Let it simply be asked, where is the security for

property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in our courts of justice."

The first Chief Justice, John Jay, also with President Washington, said, "If testimony of witnesses, if the oaths ever cease to be held sacred, our dearest and most precious rights will become insecure."

On the right side as you face it, you'll see the Constitution and the Preamble of Alabama, which says that we must invoke the favor and guidance of Almighty God; but you'll also sing--see that National Anthem. Oh, you won't see the first stanza, "Oh, say can you see"--you know it very well--"by the dawn's early light." You'll see the verse we neglect today: "Thus be it ever when freemen shall stand between their loved home and the war's desolation, blest with vict'ry and peace. May the heaven rescued land praise the power that has made and preserved this nation. And conquer we must when our cause it is just. And this be our motto--in god is our trust. And the star-spangled banner in triumph shall wave over the land of the free and the home of the brave."

Indeed, in 1956, the United states Congress, by act of Congress, by law today, made "In God We Trust" our national anthem--our national motto. "So help me God," by which we pledge to uphold the constitution, has been around since 1789, when the Judiciary Act established that as the basis of our oath.

You'll see quotes from that famous third President of the

United States, Thomas Jefferson. He said, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God, that they're not to be violated but with his wrath?" Indeed, I tremble for my country when I reflect that God is just and that His justice cannot sleep forever.

Surrounding this monument, you see every ounce of support for the acknowledgment of the sovereignty of that God and those absolute standards upon which our laws are based. Oh, this isn't surrounding the plaque with history, historical documents. All history supports the acknowledgment of God. You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgment of that God that's contained in our pledge, contained in our motto, and contained in our oath.

I thank you very much for your attendance today. And I'll allow any questions to be answered by my public information officer and my attorney. Thank you.

APPENDIX D

Quotations inscribed on the Moral Foundation of Law plaque

"A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law."--Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963

"The first work of slavery is to mar and deface those characteristics of its victims which distinguish men from things, and persons from property. Its first aim is to destroy all sense of high moral and religious responsibility. It reduces man to a mere machine. It cuts him off from his Maker, it hides him from the laws of God."--Frederick Douglass, December 1, 1850

242 F. Supp. 2d 1067

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
ROY S. MOORE, Chief Justice	)	
of the Alabama Supreme Court,	)	
	)	
Defendant.	)	
	)	
MELINDA MADDOX and	)	
BEVERLY HOWARD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
ROY MOORE,	)	
in his official capacity,	)	
	)	
Defendant.	)	

Dec. 19, 2002

FINAL JUDGMENT AND INJUNCTION

In accordance with the memorandum opinion entered November 18, 2002 (Doc. no. 138), and because defendant Roy S. Moore has declined to remove the Ten Commandments monument within the 30 days allowed for him to remove it voluntarily, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The motion for entry of permanent injunction, filed by plaintiffs on December 6, 2002 (Doc. no. 149), is granted.

(2) Defendant Roy S. Moore, his officers, agents, servants, and employees, and those persons in active concert or participation with him who receive actual notice of this injunction, be and they are each hereby ENJOINED and RESTRAINED from failing to remove, by no later than January 3, 2003, the Ten Commandments monument at issue in this litigation from the non-private areas of the Alabama State Judicial Building. In other words, this injunction does not reach areas maintained, in good faith, as private in the Judicial Building, such as a justice's chambers.

The clerk of the court is DIRECTED to issue a writ of injunction.

Furthermore, the clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

242 F. Supp. 2d 1068

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
ROY S. MOORE, Chief Justice	)	
of the Alabama Supreme Court,	)	
	)	
Defendant.	)	
	)	
	)	
MELINDA MADDOX and	)	
BEVERLY HOWARD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
ROY MOORE,	)	
in his official capacity,	)	
	)	
Defendant.	)	

ORDER

On November 18, 2002, this court held that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the Establishment Clause of the First Amendment to the United States Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala.2002). Chief Justice Moore was given thirty days to remove the monument voluntarily, and he failed to do so. On December 19, 2002, the court issued a permanent injunction requiring the Chief Justice to remove the monument by January 3, 2003. Glassroth v. Moore, 242 F. Supp. 2d 1067 (M.D. Ala.2002). On that same day, the Chief Justice filed a notice of appeal from that injunction. Currently before the court is the Chief Justice's motion asking that the court stay the injunction, pursuant to Fed. R. Civ. P. 62(c), while the case is pending on appeal. The motion will be granted.

Four factors inform a trial court's decision whether to stay an injunction: (1) the applicant's likelihood of prevailing on the merits of the appeal; (2) whether the applicant will suffer irreparable damage absent a stay; (3) the harm that the other parties will suffer if a stay is granted; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L.Ed.2d 724 (1987); United States v. Bogle, 855 F.2d 707, 708 (11th Cir. 1988). These factors, however, should not be applied as "a set of rigid rules," Hilton, 481 U.S. at 777, 107 S. Ct. at 2119; rather these "traditional stay factors contemplate individualized judgments in each case." Id. For

example, when the "balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay," only a "substantial case on the merits" is necessary to satisfy the first factor. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir.1986).

For the reasons given in the November 18 opinion, the court does not believe that the Chief Justice has presented even a substantial case on the merits. Additionally, the Chief Justice cannot show he will suffer irreparable harm unless the injunction is stayed, because the monument can be easily returned if this court's decision is reversed. Nevertheless, the court is convinced that a stay is warranted based on the other two factors of the stay inquiry.

It is almost certain that the Eleventh Circuit Court of Appeals would grant a temporary or short stay, at the very least, in order to have adequate time to consider whether a longer stay pending appeal should be granted. To review this court's denial or grant of a stay, the appellate court would need beyond the January 3 deadline to review the record to determine, among other things, whether this court's decision that the Chief Justice does not have a substantial case for appeal is correct. Indeed, if this court were sitting as an appellate court unfamiliar with the record, the undersigned (as a member of that court) would counsel granting a temporary stay for this reason. Therefore, aside from the issue of the merits of this case, there is no realistic likelihood that the monument will be removed by January 3; this court and the parties are looking at a date beyond the January 3 deadline before the Eleventh Circuit can

even determine whether a stay pending appeal is warranted. Moreover, if an expedited review on the merits is feasible, there is also a strong likelihood that the appellate court would delay reaching the merits on the stay issue and would simply address them on the final appeal.

To be sure, the plaintiffs will suffer continuing irreparable harm pending the appeal. See Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) (same). But this case does not present a circumstance where the magnitude of the harm requires the appellate court to shoot from the hip, such as a life-or-death situation or a situation where to delay a decision on relief pending appeal would leave a party without relief at all.

The court, therefore, finds that the plaintiffs', as well as the public's, main goal of the vindication of the First Amendment through the expeditious and orderly removal of the monument would be better furthered by expeditious appellate review of the case on its merits. The plaintiffs did not seek a preliminary injunction in this court; instead, the parties and this court devoted their time and resources to expedited preparation and consideration of the merits of the case. This case was, therefore, litigated in a little over a year, including the development of a complete record, the holding of a week-long trial, and the issuance of a judgment. Moreover, the appellate record is now almost complete. There is no reason why the

Eleventh Circuit, if it were to choose, could not similarly expedite its review. Toward this end, the parties should devote their immediate time and resources to an expedited appellate review of the case on the merits rather than whether a stay should be granted.

Finally, it should be repeated that the court does not discount the harm to the plaintiffs in allowing the monument to remain pending appeal of this case, nor does the court discount the public interest in having the unconstitutional actions by the Chief Justice remedied forthwith. Therefore, the court emphasizes that, upon receipt of an appellate mandate affirming this court's decision and injunction, the court will immediately lift the stay and enter another injunction, along the lines of the December 19 injunction, requiring the removal of the Ten Commandments monument within fifteen days.

According, it is ORDERED that the motion for a stay of the injunction pending appeal, filed by defendant Roy S. Moore on December 19, 2002 (Doc. no. 163), is granted.

OTHER RELEVANT ORDERS

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
ROY S. MOORE, Chief Justice of the Alabama Supreme Court,	)	
	)	
Defendant.	)	
	)	
	)	
MELINDA MADDOX and BEVERLY HOWARD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
ROY MOORE, in his official capacity,	)	
	)	
Defendant.	)	

FINAL JUDGMENT AND INJUNCTION

On November 18, 2002, this court entered an opinion and judgment holding that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the Establishment Clause of the First Amendment to the United States Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002). Chief Justice Moore was given [*2] thirty days to remove the monument voluntarily, and he failed to do so.

On December 19, 2002, the court issued a permanent injunction requiring the Chief Justice to remove the monument by January 3, 2003. Glassroth v. Moore, 242 F. Supp. 2d 1067 (M.D. Ala. 2002). On that same day, December 19, the Chief Justice filed a notice of appeal and moved the court to stay its injunction pending appeal. On December 23, the court granted the stay, noting that it

> "does not discount the harm to the plaintiffs in allowing the monument to remain pending appeal of this case, nor does the court discount the public interest in having the unconstitutional actions by the Chief Justice remedied forthwith. Therefore, the court emphasizes that, upon receipt of an appellate mandate affirming this court's decision and injunction, the court will immediately lift the stay and enter another injunction, along the lines of the December 19

> injunction, requiring the removal of the Ten Commandments monument within fifteen days."

Glassroth v. Moore, 242 F. Supp. 2d 1068, 1070 (M.D. Ala. 2002).

On July 1, 2003, the Eleventh Circuit Court of Appeals affirmed this court's November 18 judgment that the Chief Justice violated the Establishment Clause by placing the Ten [*3] Commandments monument in the Judicial Building rotunda. Glassroth v. Moore, ___ F.3d ___, 2003 WL 21499258 (11th Cir. 2003).

On July 28, before receipt of the appellate mandate, this court held a conference call to determine if the Chief Justice had asked the Eleventh Circuit to stay its mandate pursuant to Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure, which provides that, "A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." The court scheduled the conference out of concern that the mandate might issue while the undersigned was away on a family matter. During the call, counsel for the Chief Justice indicated that, although the Chief Justice was aware of Rule 41, he had not filed such a motion.

Two days later, on July 30, the Eleventh Circuit issued its mandate, and, on August 1, this court received it. Thus, although the Chief Justice could have requested a stay of the mandate (and thereby of the injunction the court enters today) pending a request for review by the United States Supreme

Court, the Chief Justice chose, for reasons not made known to this court, not to do so.

[*4] On August 4, this court held another conference call to determine if the parties had any opposition to the court carrying out the mandate and lifting its stay. Although the court had made clear in its December 23 order that the stay would be lifted immediately upon receipt of the appellate mandate, the court wanted to give all parties a final opportunity to voice any concerns. In a written response filed after the call, the Chief Justice stated that he opposes the lifting of the stay and the issuance of an injunction "on the grounds that the Court does not have the authority or jurisdiction to enter an injunction in this case." Of course, the Chief Justice's argument has already been rejected by both this court, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), and the Eleventh Circuit, Glassroth v. Moore, ___ F.3d ___, 2003 WL 21499258 (11th Cir. 2003). But most notably, the Chief Justice took the same stance in this court as he had in the Eleventh Circuit by not expressly asking that the stay be continued pending any effort to obtain review in the United States Supreme Court.[1] [*5]

Having found that defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, violated the

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[1] Admittedly, because the Chief Justice did not ask the Eleventh Circuit for a stay of its mandate pursuant to Rule 41 and because this court has no authority, absent extraordinary circumstances, to vary from an appellate mandate, Piambino v.[*5] Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985), it is debatable whether this court would have had the discretion to grant a stay even if the Chief Justice had requested one. The court need not reach this issue, however.

Establishment Clause of the First Amendment to the United State Constitution by placing a Ten Commandments monument in the rotunda of the Alabama State Judicial Building, and because the Chief Justice did not ask, either in the Eleventh Circuit or in this court, for a stay of the injunction pending application for a writ of certiorari in the Supreme Court, it is the ORDER, JUDGMENT and DECREE of the court as follows:

(1) The stay of this court's injunction, entered December 23, 2002 (Doc. no. 167), is lifted and dissolved.

(2) Defendant Roy S. Moore, his officers, agents, servants, and employees, and those persons in active concert or participation with him who receive actual notice of this injunction, be and they are each ENJOINED and RESTRAINED from failing to remove, by no later than August 20, 2003, the Ten Commandments monument at issue in this litigation from the non-private areas of the Alabama State Judicial Building. In other words, this injunction does not reach areas maintained, [*6] in good faith, as private in the Judicial Building, such as a justice's chambers.

Finally, in view of the Chief Justice's recent reassertion that this court does not have the authority or jurisdiction to enter an injunction in this case, an argument already rejected by this court and the Eleventh Circuit, this court believes it appropriate to provide the parties with some preliminary idea of the court's thinking as to how the court will proceed if later there is an allegation that today's injunction has not been complied with

within the time allowed.[2] If the plaintiffs file a motion for civil contempt, the court will immediately issue a show-cause order. If, based on the show-cause-order response and the evidence presented at a hearing, there is a finding of civil contempt, the court could levy substantial fines against Chief Justice Moore in his official capacity and, thus, against the State of Alabama itself, until the monument is removed. Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985) ("an official-capacity suit is, in all respects other than name, to [*7] be treated as a suit against the entity"). For example, the court could levy a fine of $5,000 a day for the first week (that is, for each of the first seven days), with the amount of the fine perhaps to double at the beginning of each and every week thereafter to the extent allowed by law and with the fine amount to be paid into the court at the end of each week, until there is full compliance with the order the court enters today.

It is the initial obligation of the State of Alabama, not this court and not any federal official, to remove the monument. Because the Chief Justice accepted the monument, and has maintained it in the Alabama Judicial Building, in his capacity as a state official, it is the obligation of the State of Alabama (acting through the Chief Justice and, should he fail or be incapable of carrying out his duty under the rule of law, some other appropriate state official) to remove it. The court, at this time, does not envision a scenario in which there would be an

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[2] These preliminary thoughts are just that: preliminary and only thoughts. What action, if any, the court will actually take in the event of non-compliance will be decided after the court has reviewed the evidence and heard from all parties.

opportunity for any physical confrontation between federal and state officials or between federal officials and anyone else. If called upon, this court intends, at this time, to achieve compliance by first [*8] exhausting the traditional civil-contempt process of levying fines.

The clerk of the court is DIRECTED to issue a writ of injunction.

The United States Marshall is DIRECTED to serve personally a copy of this final judgment and injunction on defendant Roy S. Moore, Chief Justice of the Alabama Supreme Court, and on the following additional state officials: the Governor of the State of Alabama, the Attorney General of the State of Alabama, the Treasurer of the State of Alabama, the Comptroller of the State of Alabama, and the Alabama Administrative Director of Courts.

Furthermore, the clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done this the 5th day of August, 2003.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

STEPHEN R. GLASSROTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1268-N
ROY S. MOORE, Chief Justice	)	
of the Alabama Supreme Court,	)	
	)	
Defendant.	)	
	)	
MELINDA MADDOX and	)	
BEVERLY HOWARD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	01-T-1269-N
ROY MOORE,	)	
in his official capacity,	)	
	)	
Defendant.	)	

ORDER

It is ORDERED that the United States Marshall personally serve a copy of the court's final judgment and injunction and companion writ, entered on August 5, 2003 (Doc. nos. 226 & 227), on each of the eight Associate Justices of the Alabama Supreme Court and on the Clerk of the Alabama Supreme Court. In its final judgment and injunction, the court inadvertently omitted requiring service on [*2] these state officials.

DONE, this 6th day of August, 2003.

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, Clauses 2 and 3

***

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Constitution, Preamble

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

Alabama Constitution, Article XVI, § 279

Sec. 279. Required of members of legislature and executive and judicial officers; form; administration.

All members of the legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation:

> "I, ..., solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

The oath may be administered by the presiding officer of either house of the legislature, or by any officer authorized by law to administer an oath.

Alabama Constitution, Amendment No. 328

***

Sec. 6.10. Administration.

The chief justice of the supreme court shall be the

administrative head of the judicial system. He shall appoint an administrative director of courts and other needed personnel to assist him with his administrative tasks. The chief justice may assign appellate justices and judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court. Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system, exclusive of probate courts and municipal courts. The legislature shall receive recommendations for appropriations for the trial courts from the administrative director of courts and for the appellate courts from each such court.

STATUTES AND RULES INVOLVED

Alabama Code of 1975 § 12-2-30 (a) and (b)(7)

§ 12-2-30. Powers and duties as to supervision and administration of courts generally.

(a) The Chief Justice shall see that the business of the several courts of the state is attended with proper dispatch and that cases, civil and criminal, are not permitted to become congested or delayed, and he shall take care that prisoners are not allowed to remain in the jails without a prompt trial.

***

(b) In connection with these duties and other responsibilities, the Chief Justice is authorized and empowered:

***

(7) To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

(3)

Supreme Court, U.S.
FILED
OCT 21 2003
OFFICE OF THE CLERK

No. 03-468

In the

Supreme Court of the United States

ROY S. MOORE, CHIEF JUSTICE
OF THE ALABAMA SUPREME COURT,

Petitioner,

v.

STEPHEN R. GLASSROTH, MELINDA MADDOX,
AND BEVERLY J. HOWARD,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

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17 pp.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Thomas More Law Center respectfully moves this Court for leave to file the attached amicus curiae brief in support of the Petitioner, Chief Justice Roy S. Moore. The consent of the attorneys for the Petitioner has been obtained. The consent of the attorneys for the Respondents was requested but refused.

The Thomas More Law Center is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs at the United States Court of Appeals level in support of the public display of such monuments. In particular, the Thomas More Law Center filed an amicus curiae brief, *with the consent of all parties*, in the United States Court of Appeals for the Eleventh Circuit in support of Chief Justice Moore. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding whether to grant Chief Justice Moore's petition for a writ of certiorari.

The Thomas More Law Center's amicus curiae brief points out that this case presents not only the opportunity, as argued in the Petition, for this Court to re-examine *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but also the opportunity to re-evaluate *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), and to clarify for the lower courts the proper scope and applicability, if any, of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.

Respectfully submitted,

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October 21, 2003

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Thomas More Law Center is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs in the United States Court of Appeals for the Sixth Circuit, Seventh Circuit, and the Eleventh Circuit in support of the public display of such monuments. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding whether to grant Chief Justice Moore's petition for a writ of certiorari.

The Thomas More Law Center appears as amicus curiae in support of Chief Justice Moore and urges this Court to grant his petition for a writ of certiorari.[1]

SUMMARY OF THE ARGUMENT

To date, this Court has not decided a case that involves the display of the Ten Commandments, whether displayed alone or as part of a broader display,

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

in a non-public school context. This case presents this Court with that opportunity.

More than twenty years ago, this Court decided in summary fashion *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), which involved the mandated display of the Ten Commandments, by themselves, in public school classrooms. This Court determined that even though the Kentucky Legislature had set forth a secular purpose for the display, the religious nature of the Ten Commandments overrode that secular purpose and thus led this Court to conclude that the Establishment Clause had been violated.

Stone, although squarely a public school case, has led to a presumption against the display of the Ten Commandments in non-public school contexts. This case presents this Court with the opportunity to re-evaluate *Stone* and to clarify the proper scope and applicability of *Stone* in order to provide lower courts with guidance on how to evaluate government displays, which include the Ten Commandments, in non-public school contexts.

Such guidance from this Court is especially needed in light of the mounting litigation over the public display of the Ten Commandments in non-public school contexts, litigation that has resulted in contrary results in this country.

This Court should grant a writ of certiorari in this case for the reasons stated in this brief, as well as for the reasons set forth in the Petition, including that this Court re-examine *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a viable precedent. Pet. 11-25.

ARGUMENT

At issue in this case is the "moral foundation of law" display that appeared in the Rotunda of the Alabama Supreme Court and contained a monument that includes the text of the Ten Commandments, which has secular and religious attributes, along with the national motto "In God We Trust," and quotations from the Declaration of Independence, George Mason, and James Madison among many other quotations that address the moral foundation of our law. In addition to the monument, the display includes a plaque with quotations regarding the moral foundation of law by Martin Luther King, Jr. and Frederick Douglass. And, the display includes a plaque inscribed with the Bill of Rights. Pet. App. 47a-50a, 52a, 104a-107a, 115a.

This Court has never decided a case that involves the display of the Ten Commandments, whether alone or in a broader context, as in the instant case, in a non-public school context. This case presents this Court with that opportunity.

More than twenty years ago, in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered a Kentucky statute that required school officials to post a copy of the Ten Commandments *alone* on the wall of each public school classroom in Kentucky. *Id.* at 39. This Court summarily struck down the law, holding that it served no secular purpose, even though the Kentucky Legislature had required the following statement of secular purpose to appear at the bottom of each display: "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Id.* at 41.

Despite the Kentucky Legislature's stated secular purpose for the display, this Court nevertheless summarily wrote: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters. . . ." *Id.* at 41. This Court, therefore, concluded that the Kentucky statute in question violated the first prong (the purpose prong) of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and consequently violated the Establishment Clause.[2] *Id.* at 42-43.

In reaching its ruling in *Stone*, apart from referencing *Lemon*, this Court relied only on public school prayer cases, *id.* at 40-43 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer), and *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer)), thus indicating that this Court viewed *Stone* as a public school prayer case in concluding that the Kentucky Legislature's requirement that the Ten Commandments be posted on the classroom walls was purely a religious admonition along the lines of the religious practices prohibited in *Schempp* and *Engel*.

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[2] Justices of this Court have criticized *Lemon*, and the time has come for this Court to re-evaluate *Lemon* as a viable precedent, as Chief Justice Moore argues in his Petition. Pet. 11-25; *see, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon* and noting further that this Court has stated that *Lemon* is not binding on it).

Even though *Stone* is essentially a public school prayer case and is limited to the public school context with regard to the display of the Ten Commandments, as Chief Justice Moore points out in his petition, "*Stone* has become the touchstone of all Ten Commandment display cases, as it was in the Court of Appeals below."[3] Pet. 18 n.4.

In particular, the Court of Appeals relied on *Stone* in rejecting Chief Justice Moore's argument that the Ten Commandments, which were part of the overall Rotunda display, depicts the moral foundation of secular duties. Pet. App. 27a, 30a. The Court of Appeals stated that as this Court declared in *Stone*, "'[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.'" *Id.* (citing *Stone*, 449 U.S. at 41). Moreover, the Court of Appeals stated that the "[u]se of the Ten Commandments for a secular purpose . . . does not change their inherently religious nature. . . ." *Id.*

The Court of Appeals' reading of *Stone* illustrates an incorrect presumption stemming from *Stone* that the display of the Ten Commandments on government property, even in a non-public school context, violates the Establishment Clause based on the view that no secular purpose for displaying the Ten Commandments can overcome the religious nature of the Decalogue.

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[3] *E.g.*, *Adland v. Russ*, 307 F.3d 471, 480-81 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 1909 (2003); *Books v. City of Elkhart*, 235 F.3d 292, 302-04 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 2209 (2001); *ACLU v. Hamilton County*, 202 F. Supp. 2d 757, 763 (E.D. Tenn. 2002); *ACLU v. City of Plattsmouth*, 186 F. Supp. 2d 1024, 1032 (D. Neb. 2002); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 865-66 (S.D. Ind. 2000).

This Court could hardly have intended such a presumption when it drafted *Stone* more than twenty years ago or intended for *Stone* to be applied to Ten Commandments displays in non-public school contexts. This case presents this Court with the opportunity to re-evaluate *Stone* and clarify the proper scope and applicability of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.[4]

Indeed, this Court should not feel constrained to follow *Stone*, which by its very nature is a weak precedent, and this Court should be concerned with the strength the lower courts have given to *Stone* in non-public school contexts.[5] *Stone* is a 5-to-4 per curiam opinion. It was a "cavalier summary reversal" of the courts of Kentucky that was done without the benefit of oral argument, briefing, or plenary consideration by this Court. *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting); *see also id.* at 43 (Burger, CJ., joined by Blackmun, J., dissenting); *id.* (Stewart, J., dissenting). This Court has explained that it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998).

Reliance on *Stone* outside the public school context has limited, if any, value since the unique and particular circumstances of the public school context, which led to

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[4] At the time *Stone* was decided, there was little, if any, litigation over the public display of the Ten Commandments in non-public school contexts, and there was only one published federal circuit court decision on the subject, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), which the *Stone* majority did not even reference, further supporting the conclusion that *Stone* is intended to be limited to the public school context.

[5] *See, e.g.*, n.3, *supra*.

the holding in *Stone*, do not extend outside that context. This Court should make that clear to the lower courts.

The public school context in which the *Stone* majority considered the display of the Ten Commandments explains the majority's summary conclusions about the Decalogue's religious nature and its summary rejection of the secular purpose advanced by the Kentucky Legislature for displaying the Ten Commandments in those classrooms.

This Court always has been especially concerned about religious activities in public schools, a heightened concern that it does not extend beyond the public school context. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 620 n.69 (1989) (explaining that although a public display of a Christmas tree and a menorah in a non-public school context was found to be constitutional, such a display located in a public school context would raise additional constitutional considerations since the Establishment Clause must be applied with a special sensitivity in that context).

The heightened concerns this Court has about anything religious in the public school setting, however, should not be applied to displays of the Ten Commandments in non-public school settings, where children are not compelled to be present as they are in a public school classroom where the Ten Commandments

are posted alone as in *Stone*. *See Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1023 (Col. 1995) (en banc) (explaining that reliance on *Stone* is misplaced in analyzing the display of the Ten Commandments except when the Decalogue is displayed in a public school classroom, where students are compelled to attend and are easily influenced), *cert. denied*, 516 U.S. 1111 (1996).

Moreover, although originating from a religious text, the Ten Commandments are not as limited in scope as the *Stone* majority suggested. This Court should make it clear to the lower courts that it did not intend in *Stone* to limit the importance of the Ten Commandments to being just a "sacred text" that lacks secular applications and that it did not intend to raise the presumption that the public display of the Ten Commandments violates the Establishment Clause even in a non-public school context.[6]

As has been repeatedly acknowledged, especially after the issuance of *Stone*, except by a majority of this Court, the Ten Commandments undeniably form the basis of the judicial code of Western Civilization, which is something that should be acknowledged in public and which was what the broad display in the Rotunda of the Alabama Supreme Court conveyed to its viewers. *See, e.g., City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) ("Undeniably . . .

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[6] Although in *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), a public school case, this Court explained that it did not mean in *Stone* that "no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization," this limitation of *Stone* needs to be reiterated by this Court in the context of the display of the Ten Commandments in a non-public school setting.

the [Ten] Commandments have secular significance [besides being a sacred text] because they have made a substantial contribution to our secular legal codes."); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society. . . ."), *cert. denied*, 121 S. Ct. 2209 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir. 1973) (noting that the Ten Commandments have religious and secular attributes), *cert. denied*, 414 U.S. 879 (1973); *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784 (E.D. Ky. 2002) ("[F]or good or bad, right or wrong, the Ten Commandments *did* have an influence upon the development of United States law. . . ."); *Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("The 'Ten Commandments,' while a sacred text to some and an ethical code of conduct to others, is also a landmark in the history of the development of Western law."), *aff'd in part, rev'd in part*, 297 F.3d 995 (10th Cir. 2002); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1428 (W.D. Va. 1983) ("[T]he Ten Commandments have had immeasurable effect on Anglo-American legal development."); *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1024 (Colo. 1995) (en banc) (noting "the historical fact that the Ten Commandments has served over time as a basis for our national law"), *cert. denied*, 516 U.S. 1111 (1996).

This Court should clearly acknowledge the contributions the Ten Commandments have made to the development of our law to ensure that there is no presumption, as *Stone* tends to engender, that there can be no secular purpose for the display of the Ten Commandments in public, even in a non-public school context.

Along those lines, because *Stone* pre-dates *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which are this Court's two leading cases that provide the analytical framework for determining the constitutionality of government displays of items with religious connotations, this Court should clarify for the lower courts how *Stone* should be weighed, if at all, when analyzing the display of the Ten Commandments in non-public school contexts in light of *Lynch* and *Allegheny*.

In *Lynch* and *Allegheny*, this Court upheld the government display of religious symbols (the crèche and the menorah) as part of a broader display in a non-public school context. *Lynch*, 465 U.S. at 671-72, 687; *Allegheny*, 492 U.S. at 581-82, 621. Although in *Lynch* and *Allegheny* religious objects (the crèche and the menorah) were permitted to be included in public displays, the same result does not generally occur when the Ten Commandments are involved, even though the Commandments have both sacred and secular attributes, which can reasonably be attributed to the presumption in *Stone* against the public display of the Ten Commandments, no matter the secular purpose for the display. If a crèche and a menorah, both religious symbols, may be included in public displays, then the Ten Commandments, which have both sacred and secular attributes, should be permitted, especially when the Ten Commandments are included in a broad display, as occurred here, to commemorate the foundation of our laws.

In sum, this case presents this Court with the opportunity to re-evaluate and clarify *Stone* and to re-examine *Lemon*. In so doing, this Court should give guidance to the lower courts on how to analyze displays of the Ten Commandments in non-public school

contexts, which is especially needed in light of the mounting litigation in this area that has produced contrary results throughout this country. *E.g.*, *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (allowing display of Ten Commandments); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (not allowing display of Ten Commandments), *cert. denied*, 123 S. Ct. 1909 (2003); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (not allowing display of Ten Commandments), *cert. denied*, 121 S. Ct. 2209 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (allowing display of Ten Commandments), *cert. denied*, 414 U.S. 879 (1973); *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013 (Col. 1995) (en banc) (allowing display of Ten Commandments), *cert. denied*, 516 U.S. 1111 (1996).

CONCLUSION

This Court should grant a writ of certiorari in this case for the above-stated reasons, as well as for the reasons set forth in the Petition.

Respectfully submitted,

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No. 03-468

IN THE
Supreme Court of the United States

ROY S. MOORE, Chief Justice,
Supreme Court of Alabama,

Petitioner,

v.

STEPHEN R. GLASSROTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF NATIONAL CLERGY COUNSEL, INSTITUTE IN BASIC LIFE PRINCIPLES, AND INTERNATIONAL REAPERS FOUNDATION, INC. FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICI CURIAE*

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The National Clergy Counsel, Institute in Basic Life Principles, and International Reapers Foundation, Inc. hereby move, pursuant to Supreme Court Rule 37.2 to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the Supreme Court of United States. This motion is filed because the parties have not consented to this *amicus curiae* brief.

The National Clergy Counsel is a Charitable organization which consists of pastors, priests, church leaders, and individuals from a variety of religious organizations and denominations representing several thousand people from every state in the Union. They believe the Ten Commandments represent the moral foundation of this nation and should be displayed publicly because of the tremendous moral direction it gives to people.

Institute in Basic Life Principles, a not-for-profit educational organization conducts seminars for judges, attorneys, legislators, families, young people, to enable them to deal with the particular pressure upon them resulting from their environment, their marriages, finances and the like amongst the eroding moral foundation of our nation. During the past approximately 38 years seminars having been conducted in major cities throughout the United States, Canada, and to some extent internationally, several million alumni have attended through word-of-mouth recommendations. They believe that failure to display the Ten Commandments publicly adversely affects the moral culture of this nation.

International Reapers is a not-for-profit Christian organization which networks resources for Christian leaders in some 35 or 40 third world countries. It corresponds with some 3000 leaders in those nations who are anxious about the moral leadership of the United States and in the world. The Ten Commandments are displayed, for example, in the embassy in Ethiopia and in Kenya. Leaders in these countries have expressed intense interest in the display the Ten Commandments publicly in United States because they believe it would be a positive influence in their own country and help establish a bridge for

relationships. Such cooperation on a universal standpoint, they contend, would help to establish peace where there is no peace.

This brief will assist the court in determining whether or not certiorari should be granted. Amici supports the reasoning of the petitioner with reference to the First Amendment as argued in their petition. Justice Souter in a case sometime ago noted that the court was following precedent since the *Everson* case in 1947 unless some "compelling reason" dictated otherwise. This brief, Amici contends, presents that compelling reason requiring the court to re-examine the position which it has taken since *Everson* on issues such as the one at bar.

This brief supports that reason on basically two grounds.

(1) The law which should govern the decisions in cases such as the one at bar is to be drawn from the meaning of the precise words as used in the founding documents. The terms, "Laws of Nature and of Nature's God" that are contained in the Declaration of Independence as incorporated in the Constitution by reason of the last paragraph under the phrase "and the 12th year," and underscored by the reference to a "Creator, " and "Law of Nations" as used in Article 1 § 8 of the Constitution when properly defined become the law of this land. Those terms do not establish a "religion," they establish the law which is not subject to alteration by a court's opinion. As will be discussed in the brief, there is substantial support for this position from the 1945 Nuremberg trials which were argued by Associate Justice Robert Jackson as the United States chief prosecutor

(2) The moral fiber of this nation is being destroyed by a lack of absolutes. In 1947, 171 years after the Declaration of Independence and contrary to previous legal precedent legal precedent, the Supreme Court in *Everson v. Board Of Education of Ewing TP.*, 330 U.S. 1 (1947) broke new ground in ruling on the public expression of God, declaring that the First Amendment created a "wall of separation between church and state." Since that date decisions have continued to erode the principles of God's law contrary to our founding documents.

Ignored was the legal content expressed in the documents themselves. Since that decision, by majority rulings of this court, Christian teaching and principles are systematically and relentlessly repressed in our public life in the language of" religious liberty;" educational institutions are subjected to atheistic teaching inconsistent with the Christian faith; the government and its philosophies presently control the educational system and have removed from that system any reference to God or Christian principles; no teaching from the Bible or even its display or discussion is permitted; by application oh "freedom of speech" obscene language and illustrations are permitted in characterizing the Christian faith and the Holy Scriptures; the influence of the Holy Scriptures is being totally removed from the public domain; Christian teachings have been deemed to stand in the way of individual liberty ; the individual's own idea of what is right or wrong in a moral sense must govern; absolutes no longer govern but only that which the courts declare; conduct which is a crime in the moral sense is regarded as innocent in law.

A few illustrations of such decisions would include: A students may not see the Ten Commandments since they might read, meditate upon, respect, or obey them. *Stone v. Graham,* 449 U.S. 39 (1980); *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.C. N.D. 1980); *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); A school song was struck down because it promoted values such as honesty, truth, courage, and faith in the form of a "prayer." *Doe v. Aldine Independent School Dist*, 563 F. Supp. 883 (U.S.D.C., Tx. 1982); a public Cemetery may not have a planter in the shape of a cross. *Warsaw v. Tehachapi* CV F -90-404 EDP (U.S.D.C., E.D. Ca. 1990.); a classroom library may not contain any books which deal with Christianity, or for a teacher to be seen with a personal copy of a Bible in school. *Roberts v. Madigan*, 702 F. Supp. 1505 (D.C. Col. 1989), 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025; 120 L. Ed. 2d 896. A war Memorial cannot be erected in the shape of a cross. *Lowe v. City of Eugene*, 451 P.2d 117 (Sup. Ct. Or. 1969), *cert denied*, 434 U.S.C. 76. A child may

not ask whose birthday is celebrated by Christmas. *Florey v. Sioux Falls School District*, 464 F. Supp 911 (U.S.D.C., S.D. 1979), *cert. denied*, 449 U.S. 987 (1980). In a high school class in Dixon, Tennessee, students were required to write a research paper using at least four sources. When Britney Seattle wrote a paper on the life of Jesus Christ she was given a zero by the teacher, even though students were permitted to write about reincarnation, witchcraft, and the occult. *Britney Kay Seattle v. Dixon County School Board*, 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 64 L.W. 3478 (1995).

Every reference to God, Christian principles or the Bible are systematically being ordered removed not only from the schools but from every vistage of public life whenever and wherever challenged. At the same time students may attend school or enter public places wearing sweatshirts or other clothing espousing foul language, four letter words and anti-God statements. In the place of the foundational law of God and his absolute principles we are inheriting an atheistic society with its godless principles. The course of such legal decisions is not only in specific violation of our founding documents, but is destructive of the very foundation of this nation.

A decision recognizing the principles stated in this brief will assist in bringing peace to a troubled Judiciary as well as a confused society.

It is respectfully requested that this Court grant leave to file the attached brief of amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS IN THIS CASE[1]

Amici deal with people who are seeking to establish a firm moral basis for their life and their family amidst what is increasingly a moral chaos. Those in other nations look to the United States for moral leadership and stability which affects not only their own government but their very lives. In contrast to moral influence and example immorality by way of pornographic films and literature from the United States invades their land. Moral absolutes expressed by the government of the United States are a necessary influence.

In the meanwhile, Moral Evil, like Sennacherib's plundering army standing at the gate of Jerusalem in the time of King Hezekiah, cries out to the beleaguered citizens of the United States that hideous lie, "Surrender and you can live in peace in your land with wonderful crops and honey." To the contrary, death, torture, and enslavement is the result of such capitulation illustrated in the millions and millions of people who have suffered and are suffering in the clutches of an ungodly culture.

A ruling in this case recognizing the display of the Ten Commandments is essential in awakening the moral conscience of this nation. A strong national moral conscience is essential for national security

I. THE FIRST AMENDMENT

The first amendment does not restrict the *public expression of God*,[2] but such expression is warranted under the Constitution which thereby permits the display of the Ten Commandments. The First Amendment requires a "Law of Congress" which

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1. None of the parties have participated in the preparation or financing of this brief.

2. When the phrase "public expression of God" is used anywhere in this brief, it refers to any display or use of Biblical symbolism in any public place such as schools, courthouses, public squares, cemeteries, or any other public property or on which taxes are paid, and includes such things as the Ten Commandments, prayer, Bible reading or display of the Bible, and in general anything that has been challenged under the First Amendment.

language has a precise meaning. Congress has not passed any such "Law."

II. Precise meaning of the words used in the founding documents must control and is essential to proper construction

The founders mirrored their preconceived ideas and convictions in the Declaration of Independence and the Constitution with precise words in accord with "projection principle." That principal states that someone's convictions will dictate what he writes on the subject.

Respondent in *Newdow* unwittingly emphasizes that principal in his motion asking Justice Scalia to recuse himself claiming the statements alleged to have been made concerning the Pledge of Allegiance would govern his written opinion. Justice's Scalia affirmed that principal when honorably he did recuse himself. ***THE FOUNDING DOCUMENTS MUST BE READ WITH PRECISELY THE SAME PRINCIPLE IN MIND, RECOGNIZING THAT PREVIOUSLY[3] EXPRESSED CONVICTIONS OF THE FOUNDERS WOULD BE ENGRAFTED INTO THE DOCUMENTS THEMSELVES.***

A different thought process goes into creating a document in contrast to examining its meaning. In creating a document, words are selected that have precise meanings. The Greek "logos" means word. It is the root word for logic. It links words and reason. In 1776 words were designed to carry a specific meaning and thought. The founders of this nation were indoctrinated with that concept. Without electronics they read, wrote and talked.

Consequently when documents were drafted, the words used were carefully chosen to convey a precise meaning. Specific words were chosen after much debate. An honest evaluation of interpreting any document requires that preconceived idea of

3. "Previously" is specifically chosen because under long-standing rules of evidence subsequent statements or documents inconsistent with the document drafted are inadmissible to change its meaning. This certainly applies to the alleged interpretation given to Thomas Jefferson's letter concerning the First Amendment.

meaning should **not** be employed, only the meaning applicable at the time they were used.

James Madison declared[4]:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers . . . *What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.* (emphasis supplied)

Keeping in mind the principal that *convictions of the writer are projected into documents being drafted on the subject*, the following is essential in extracting the definition of the words used in the documents prepared by the founders[5]. The historical evidence of their activities, the resources they used for study, their speeches, etc. are all significant in discerning that definition. Definition of the words used at that time is relevant, **not today's** contemporary interpretation.

That the founders expressed publicly their beliefs and convictions concerning God and His law and religion is beyond debate. The very lives of those founders demonstrated their convictions. Words selected had a definite source describing

4. *The Writings of James Madison*, Gaillard Hunt, editor (New York and London: G.P. Putnam's Sons 1910) Vol. IX, p.191, to Henry Lee on June 25, 1824.

5. "Founders," as used herein, includes those who had a significant influence in, or provided prominent leadership for, or had a substantial impact upon the birth, development and establishment of America as an independent, self-governing nation. That obviously includes the signers of the Declaration of Independence, the 14 Presidents of America who led the Continental Congress, the delegates to the Constitutional convention, those who signed the Constitution, judges, governors, etc., as well as those who served in administrative capacity in the early years of this Republic experiment as Presidents, justices of the Supreme Court, and other of official capacities.

meaning, primarily Blackstone; although both Locke and Hooker denoted the same meaning. Premised on historical evidence the article by Kenneth Woodward and David Gates, "How the Bible Made America," *Newsweek*, December 27, 1982, p. 44, observed that the founders quoted the Bible more frequently than any other source and is indisputably a significant commentary in the foundation of our government. They conclude that "historians are discovering that the Bible, perhaps even more than the Constitution, is our Founding document." Their heritage stemmed from the faith of their forefathers as recorded in the charters of the colonies.[6]

Representative of virtually the whole, a truncated review of some of the founders religious associations, statements, and public declarations reveal the following[7]:

John Quincy Adams: Vice President of the American Bible Society and member of the Massachusetts Bible Society. **Abraham Baldwin*: chaplain in the American Revolution for two years[8]..*Joel Barlow* (diplomat under Washington and Adams): Chaplin in the American Revolution for three years. *Joseph Bloomfield* (Governor of New Jersey): member of the New Jersey Bible Society. *Elias Boudinot* (president of the Continental Congress): founder and first president of the American Bible Society; president of the New Jersey Bible Society; member of the American Board of Commissioners for foreign nations; member of the Massachusetts Society for

6. The charters of Virginia, Mayflower compact, First Charter of Massachusetts, Maryland, North Carolina, Rhode Island, Connecticut, New Hampshire, Georgia, and New Jersey, are a virtual restatement of each other in the belief in and propagation of the Christian faith.

7. Obviously this can only be an abbreviated representation because the preserved historical records are replete with conclusive illustrations that the founders had a hard-core conviction about God and his Holy Word. As a matter of fact they were the sturdy middle of society but today would probably be classified with what is inaccurately represented as the "far right."

8. *signer of Constitution;**signer of Declaration of Independence;***signer of both

promoting Christian knowledge. **Alexander Hamilton*: proposed formation of the Christian Constitutional Society to spread Christian government to other nations. **Rufus King:* selected as manager of the American Bible Society but refused so as to focus his attention on the Episcopal Bible Society. **John Langdon*: Vice President of the American Bible Society. **James McHenry*: President of the Baltimore Bible Society. ***Robert Treat Pain*: Military Chaplain. **Charles Pinckney*: President of the Charlestown Bible Society; Vice President of the American Bible Society. ***Benjamin Rush*: Founder and manager of the Philadelphia Bible Society. *Caleb Strong* (Constitutional convention; U.S. Senator; governor of Massachusetts): Vice President of the American Bible Society. *Increase Sumner* (Governor of Massachusetts): Member of the Society for Propagating the Gospel among the Indians and Others. Other founders were involved in similar organizations. None were atheists.

Jefferson encouraged a Day of Fasting and Prayer for June 1, 1774, *Writings*, Vol, I pp 9-10; he issued a proclamation for a Day of prayer and Thanksgiving while Governor of Virginia. (See *Official Letters of the Governor's of the State of Virginia*, H.R. McIlwaine, editor [Richmond: Virginia State Library, 1928] Vol. II pp. 64-66.

Madison, introduced bills for "Saving the Property of the Church;" "Appointing Days of Public Fasting and Thanksgiving;" "Annulling Marriages Prohibited by Levitical Law and Appointing the Mode of Solemnizing Lawful Marriage." The *Papers of James Madison*, Vol. III, pp 396.

John Jay, original Chief Justice of the U. S. Supreme Court "believed in Christ" and thanked God he did,. If there was no God there could be no moral obligations and he did not see how society could subsist without them. *Life*, Vol. II pp. 346-347.

Joseph Story, appointed to the U.S. Supreme Court by Madison was considered to be the founder of Harvard Law School and its Professor of Law (1829-45), expressed verbally

and in writing his belief in God and the declaration that this was a Christian nation following God's laws.

The first Continental Congress met in 1774; the second Congress met in Philadelphia in May, 1775. The representatives from the 13 States were sent home to each adopt Constitutions.[9]

CONNECTICUT: . . . .

being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; . . . . as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for . . . (continued to operate under the charter of King Charles)

DELAWARE:

Every person who shall be chosen. . . . And also make and subscribe to following declaration, to wit: "I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for ever more before ever more; and I do acknowledge the holy scriptures of the Old and New Testaments to be given by divine inspiration." . . . . There shall be no establishment of any one religious sect in this State in preference to another. . . .

NEW HAMPSHIRE:

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, ... As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, ... through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; . . . . do hereby fully impower the legislature to authorize from time to time, the

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9. The 13 states adopted new constitution's which were for the most part submitted to a popular vote; Massachusetts and New Hampshire's constitutions were done by convention and ratified by popular vote. For the most part all stood for 50 to 75 years with Massachusetts getting its and overhauling in 1917-18.

several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality . . . And every denomination of christians . . . shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.

MASSACHUSETTS:

It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator, and Preserver of the universe. . . . As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion, and morality: Therefore . . . the legislature shall from time to time authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God... Any person chosen governor,[etc] . . . subscribe the following declaration, viz: . . . . I . . . do declare that I believe the Christian religion, and have a firm persuasion of its truth; . . . .

NEW JERSEY:

XVIII. . . . no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what

he believes to be right, ... XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles. . . .

GEORGIA:

. . . . All persons whatever shall have the free exercise of their religion. . . . : and shall not, unless by consent, support any teacher or teachers except those of their own profession

NEW YORK:

. . . . the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . . .

NORTH CAROLINA: . . .

. . . . all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences him. . . . no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, ... shall be capable of holding any office . . . . in the civil department within this State . . . . XXXIV . . . . shall be no establishment of any one religious church or denomination in this State, in preference to any other; . . . .

SOUTH CAROLINA: . . .

. . . . all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants. . . . shall enjoy equal religious and civil privileges. . . . 1st. That there is one eternal God, and a future state of rewards and

punishments. . . . God is publicly to be worshipped. . . . That the Christian religion is the true religion. . . . That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice. . . . No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship. . . .

MARYLAND: . . .

. . . as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; . . . . the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion. . . . all acts of Assembly, lately passed, for collecting monies for building or repairing particular churches or chapels of ease, shall continue in force, and be executed. . . . That . . . . oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion . . .

PENNSYLVANIA:

We . . . . confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) . . . . all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship . . . each member [of the house of representatives], before he takes his seat, shall make and subscribe the following declaration, viz I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration. . . . no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State. . . .

While each of the constitutional provisions very to some extent, it is **very** clear that they averred the recognition of God, His Law, and that He is to receive public veneration. It was these various declarations that were to be harmonized in the founding documents of a new nation.

Consistent with their intense conviction that the people recognize God and his Word as governing in the new nation, on September 11, 1777 Congress ordered 20,000 Bibles imported.[10] On September 12, 1782 the full Congress approved the printing of the first English-language Bible ever printed in America. The following endorsement was printed in front of that Bible:

> Whereupon, Resolved, That the United States in Congress assembled . . . recommend this addition of the Bible to the inhabitants of the United States.[11]

A plethora of historical evidence that would fill volumes, certainly proves beyond a reasonable doubt that a universal conviction existed among the founders of the reality of the God of the Bible and His Law. Such Christian belief was to be part of the public forum. It was unquestionably part of the Common Law.

The Supreme Court of the United States in *Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S. Ct. 511 (1892), reviewed the religious history of this country from the colonial charters through various State Constitution's to the date of the opinion. All 44 states at that time contained language which "directly or by clear implication recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community." Delaware's was cited which proclaimed "Faith in God and the Father and in Jesus Christ his only Son and in the Holy Ghost. . . . acknowledge the Holy Scriptures of the old

10. *The Second Report of the Managers of the New-Jersey Bible Society*, p. 14.

11. *Journals of . . . Congress* (1914), Vol. XXXIII p. 574, September 12, 1782.

and New Testament to be given by Divine inspiration," illustrated the nation's position on God and his involvement in public affairs. The court asserted that "this is a Christian nation" not Muslim or Grand Lama. *Holy Trinity* is flatly contradictory of the majority opinions of the Supreme Court rendered since 1947 asserting "separation of church and state." In trial work the closer in time the witness is to the actual happening of events, the more accurate the analysis is of the situation.

It is significant to note that of the 55 delegates to the "constitutional convention," only 39 signed because of their ardent fear the federal government would usurp their sovereign rights. That fear delayed ratification until the spring of 1790 when Rhode Island finally ratified. At that time Congress was already in the process of crafting amendments to the Constitution to address the "sovereignty" issue. Evidenced by the religious content of each State Constitution, it would defy plain logic to conclude the First Amendment was intended to remove God from government. The amendment simply assured the sovereign states, *that Congress would not pass a law which established a particular denominational church.*[12] Certainly supporting this reasoning by implication is that some of the State Constitution's prevented a minister or religious leader from holding office lest a particular denomination attempt to establish a particular state church.

THE PRECISE WORDS AND PHRASES CHOSEN BY THE FOUNDERS DICTATE THE GOVERNING LAW

A comment of Justice Scalia in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), started me on a search for applicable law in a different direction when he stated:

> The conception of the judicial role that he possessed, and that we shared by succeeding generations of American judges until very recent times, took it to be 'the province and duty

12. *Blackstone's Commentaries* further support that conclusion by using the term "religion" as referring to the government established Church of England.

> of the judicial department to say what the law is,' (citation omitted), not what the law shall be. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone . . .

Establishing the meaning of critical provisions of the founding documents at the time the documents were drawn is absolutely essential to determine what law governs the "public expression of God.[13]

The precise terminology used in the Declaration of Independence, the Constitution, and the Bill of Rights develops a pattern of explanation which becomes self-evident: aided by the relevant evidence recited earlier in this brief.

Material terms in the documents are as follows:
(All emphasis are added)

Declaration of Independence:

> ***Which the Laws of Nature*** and of ***Nature's God*** . . . . ***endowed by their Creator*** with certain unalienable Rights, First among These Are Life, Liberty and the Pursuant of Happiness . . . . appealing to the ***Supreme Judge of the World*** . . . . with a firm reliance on the ***Protection of Divine Providence***, we mutually pledged to each other our Lives, our Fortunes, and our sacred Honor.

Article, § 8 of the Federal Constitution is relevant to the pattern and states:

> To define and punish piracies and felonies committed on the high seas, and offenses against the ***Law of Nations***.

Article VI of the Constitution provides in the third paragraph thereof:

> The Senators and Representatives before mentioned and the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by **Oath or Affirmation**, to support this Constitution; . . . .

13. Footnote 2 contains the definition of this phrase as used in this brief.

Article VII of the Constitution provides in the last paragraph thereof:

> Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the ***Year of Our Lord*** one thousand seven hundred and Eighty-seven ***and of the Independence of the United States of America the Twelfth***. In Witness whereof, We have hereunto subscribed our Names, [George Washington-President and deputy from Virginia, etc]. (emphasis supplied)

The First Amendment provides in pertinent part:

> Congress shall make no ***law*** respecting ***an establishment of religion***, or ***prohibiting*** the free exercise thereof; . . . .

Amendment X of the Bill of Rights provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Careful examination of each State Constitution reveals recitation of the authority of God although with different verbiage. There was of course corporate recognition of God by use of the term *Creator*, *Supreme Judge of the World*, and *Protection of Divine Providence*. The thorny part of the issue was how to harmonize and condense the variety of expressions into a compact document they were endeavoring to draw.

The key is the Declaration Of Independence and the accuracy of the words employed: *Creator*, *Laws of Nature* and *Nature's God*. Those universally recognized terms which satisfied all 55 signers because they had a definite and declared meaning.

Blackstone's *Commentaries on the Laws* introduced in 1766 exported the meaning. Blackstone's Commentaries became THE law book of the Founding Fathers. Numerous early American lawyers, legal scholars, and publications cited Blackstone's work as a key legal source. For example, Blackstone is invoked as an authority in the writings of James Kent, James Wilson, Fisher aims, Joseph story, John Adams, Henry Lawrence, Thomas

Jefferson, James Madison, James Otis, et al. In fact so strong was it's influence in America that Thomas Jefferson once quipped that American lawyers used Blackstone with the same dedication and reverence that Muslim's used the Koran.[14] A complete reading and analysis of Blackstone's *Commentary* demonstrates the categorical recognition of God and the Bible and the terms to which he gives specific definition. A truncated explanation follows:

> Law, in it's most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the *LAWS OF NATURE AND OF NATIONS*. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.
>
> Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. This will of his Maker is called the *LAW OF NATURE*. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.
>
> This *LAW OF NATURE*, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; . . . . he has laid down only such laws as were founded in those relations of *justice*, that existed in the *nature of things* antecedent to any positive precept. These are *the*

14. *Writings of Thomas Jefferson*, Albert Bergh, editor-Washington DC: The Thomas Jefferson Memorial Association, 1904, Volume 12, Page 392, to Governor John Tyler on May 26, 1810.

> *eternal, immutable laws of good and evil* . . . he has . . . so inseperably interwoven the laws of eternal *Justice* with the *happiness of each individual, that the latter cannot be obtained but by observing the former* . . . the doctrines thus delivered we called the revealed or divine law, and are to be found only in the *Holy Scriptures*... upon these two foundations, the law of nature and the law of revelation, depend all of human laws; that is to say no human laws should be suffered to contradict these.

Locke employs the same definition:

> The *Law of Nature* stands as an eternal rule to all men, legislate doors as well as others. The rules that they make for other men's actions must. . . . be conformable to *the Law of Nature*, i.e. to the will of God.[15]

Richard Hooker, a favorite of Locke and many of the founding fathers, referenced the *law of nature* as coming from the Scripture which was filled with *Laws of Nature.*[16]

The term "Creator" found in Blackstone and used in the Declaration of Independence and the term *Law of Nations* found in the Constitution, Article I § 8 furthers supports the use of Blackstone, and his definition of the terms incorporating them directly into the Constitution.

Article VII of the Constitution then legally engrafts the Declaration Of Independence into the Constitution as effectively as though it had said, "attached hereto and made a part hereof," by the declaration ". . . by the unanimous consent of the States present the 17th day of September in the *year of our Lord* one thousand seven hundred and eighty seven, *and of the independence of the United States of America the twelfth.* As a direct consequence, all the terms as defined above are fused into the Federal Constitution, and thus become the governing Law of this land. Each of the original 13 states adopted the

---

15. John Locke, *Two Treaties*, Book II, p. 285, Chapter XI, § 135.

16. *The Works of That Learned and Judicious Divine, Mr. Richard Hooker*, Vol. I pp, 148, 207, 230, 427.

Declaration of Independence as part of their law as have each of the states admitted to the union since that time all of which are bound by the terms of the Declaration.

The "oath" is another corroboration that a supernatural and eternal God and his Law have been engrafted into our Federal documents. The purpose of the oath is rooted in antiquity premised on the fact that man will die and then face his maker. God is eternal and is a giver of rewards and punishments. The oath is a prerequisite part of legal life. Blackstone's commentary on that issue puts it this way:

> OATHS: Doubtless the preservation of Christianity, as a national religion, is, abstracted from it's own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being; and a firm persuasion that he superintends and will finally compensate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our saviour Christ) these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting.

The war trials at Nuremberg following World War II emphasize the significance of a national moral underpinning. The trials began on November 20, 1945. Count one of the indictment included the charge of "Crimes against Humanity." The record discloses Justice Jackson's description of the evidence which was designed on the part of the defendants to destroy the moral fiber of the people of Germany. That evidence disclosed the Christian Church must be silenced.; the government and its philosophies must control the educational system and remove from that system any reference to God or Christian principles; a document introduced into evidence asserted "of course, any such program must reckon with the opposition of the Christian Church. This was recognized from

the beginning. . . . national Socialism and Christian concepts are irreconcilable, and the people must be separated from the churches and the influence of the churches totally removed." Justice Jackson argued:

> The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law. . . . the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, 'under God and the law.'

The importance of that evidence from the Nuremberg trial and justice Jackson's arguments is it demonstrates the requirement of a firm national moral basis to stand against evil.

The founders recognized the necessity of the recognition of God both in government and in the public forum representing a concept of eternity, morality, accountability, and charity.

Think of how that concept of eternity and God comes through in our corporate experience of science and discovery. In the 1960s when the American astronauts were the first ones to go round the dark side of the moon, and fired their rockets on that homeward journey, they were given a glimpse of this universe that had not been given to any other human eye. As they saw Earth rise over the horizon of the moon draped in a beauteous mixture of blue and white, garlanded by the glistening light of the sun against the black void of space, they experienced what no language could express. So from tens of thousands of mile away those of us who were living at that time on planet Earth heard from them the only words which they deemed appropriate to pull that experience together: "In the beginning God."

Our court decisions over the past 50 years have in increments extracted from our public life and our educational system the concept of an eternal God and the reality of eternity. That vacuum has been filled, without any counterbalance from

the Word of God, with the teaching of Darwin's philosophy of evolution as though that represented scientific truth. The background for that teaching is the "God is dead and we have killed him" philosophy of the German atheist Frederick Nietzsche. If God is dead then the only thing left is human reason. Thus was developed the theory of positive law. Nietzsche reduced everything in life to the will for self-assertion. Since God-given values were dead, it was up to humans to create their own values. Then in 1859 Charles Darwin published his book on macro-evolution, "On the Origin of Species." Agreeing with Darwin, Karl Marx said, "In our evolutionary concept of the universe, there is absolutely no room for either a Creator or a Ruler."[17] So parroting Darwin's philosophy of evolution and Nietzsche's nihilistic philosophy, we are educating our young people that "Now" is all we have because there is no tomorrow.

That rule of relativism is not only not working, it is the antithesis of the law of this land as established in our founding documents.

The serious consequences of the violation of those foundational principles are embedded in our national history. From the inception of the United States of America, despite the firm declaration in its founding documents that "all men are created equal," and although many of the Founders had feelings against slavery that went beyond words, this nation violated "the Creators" fundamental law of equality. That violation was abetted by the dishonest "politics and morality" of the justices who combined to produce the infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 Howell) 393 (1857). Justice Taney was a Southern partisan who was determined to create a constitutional right to own slaves, not only in violation of the Declaration of Independence, but the statute of a state which forebode it. To accomplish that he simply changed the plain meaning of the due process clause of the Fifth Amendment. As a direct result of the violation of the law of our "Creator" by

17. Marx and Engles On Religion, NY: Schocken 1964, page 295.

slaveholders, including Christian slaveholders, judges and politicians, in 1861 this nation became embroiled in a bloody and devastating Civil War with its tragic and divisive consequences, the resulting shadow under which we still live.

Sen. Joseph Biden illustrates the anti-God documents philosophy that is attacking our founding documents that the sole source of moral law comes from the human mind not from any higher power. In resisting the nomination of Judge Clarence Thomas to fill a vacancy on the United States Supreme Court bench in 1991, he feared that the judge would use his belief in natural law as a means of interpreting the Constitution. In an essay he authored (Philip E. Johnson, "Reason in the Balance," Downers Grove, Illinois: Intervarsity, 1995, page 134) he stated:

> 'Good' natural law does not dictate a moral code to be imposed upon individuals. Finally, 'good' natural law is not a static set of 'timeless truths' but rather an evolving body of ideals that change to permit government to adjust to new social challenges and new economic circumstances. 'Bad' natural law, by negative implication, would be an unchanging moral code that restricts either the freedom of individuals to do as they think best, or the freedom of government to do whatever the public interest requires.

The consequence of that thinking adopted by the court system resulting in the gradual extraction of God from our public life as has been going since 1947 is reflected in the moral condition of the nation today. A few statistics demonstrate the following commencing with the year 1963 until 1993: birthrates for unwed girls 15-19 years of age rose from 15 to 45[18]; violent crimes from approximately .25 million to 1.9 million[19]; in the age group of 10-14 sexually transmitted diseases have gone from 14 to 70 per 100,000 total population in 1990 and then dropped

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18. Basic data from Department of Health and Human Services and statistical abstract of the United States.

19. Basic data from statistical abstract of the United States, and the Department of Commerce, Census Bureau.

back to 54 in 1993[20]; SAT total scores and dropped from 1980 to 910 in 1994[21]; family stability, that is single-parent households with a female head, no spouse present have risen from 5 million households in 1963 to 12 million in 1993-94.[22]

Such thinking is a total aberration of the content that is fused into our founding documents.

It is condign that those principles are to control rather than the peripatetic interpretations by our courts on the subject since *Everson v. Board of Education of Ewing TP.*, 301 U.S. 1 (1947), no matter how wonderfully worded. It is apodictic that the "founders" acknowledged those "foundational principles," which are uniquely condensed in the provisions of our Constitution. Consequently our Constitution specifically acknowledges God and His Law as part of the public life of this nation and requisite for public expression.

As Alexander Solzhenitsyn said: ". . . . Between good and evil there is an irreconcilable contradiction. One cannot build one's national life without regard to this distinction." He reviews the monstrous price of death and slavery that was paid by millions and millions of people in the Soviet Union as a result of the denial of that distinction. He would like to have us "accept" their experience without having to pay that hideous price.

CONCLUSION

The writ of certiorari should be granted the lower courts reversed permitting the display of the Ten Commandments in the Supreme Court of Alabama as well as anyplace else in these United States and public buildings.

---

20. Basic Data from the Center for Disease Control in Department Of Health And Human Services.

21. Basic Data from the College Entry Exam Board, New York.

22. Basic data from statistical abstract of the United States, and the Department of Commerce, Census Bureau.

Respectfully submitted,

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ROY S. MOORE, in his official capacity as Chief Justice of the Alabama Supreme Court,
Petitioner,

v.

STEPHEN GLASSROTH,

Respondent.

ROY S. MOORE, in his official capacity as administrative head of the Alabama Judicial System,
Petitioner,

v.

MELINDA MADDOX and BEVERLY J. HOWARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CORAL RIDGE MINISTRIES, FOCUS ON THE FAMILY, AND FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONER

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Now come Coral Ridge Ministries, Focus on the Family, and Family Research Council (collectively "*Amici*") and seek leave to file this brief *Amici Curiae*. As grounds therefore, *Amici* would show that:

1. Pursuant to Supreme Court Rule 37(2)(b), counsel for *Amici* wrote to counsel for all parties in this action

requesting written consent to file this brief, which letters are made part of this motion;

2. Petitioner Alabama Supreme Court Chief Justice Roy S. Moore has granted permission for *Amici* to file this brief, whose letter is made a part of this motion;

3. Counsel for Respondents Maddox and Howard have withheld their written consent for *Amici* to file this brief and communicated their denial through an e-mail stating in part: "In light of our having waived the filing of a response to Moore's cert petition, we are not consenting to the filing of amicus briefs in support of the petition." This e-mail is made part of this motion;

4. Counsel for Respondent Glassroth also withheld written consent for *Amici*, communicating denial through a phone conversation.

Amici are non-profit organizations that appreciate the significant role religion plays in American life and the Constitution's protections of religious freedom. *Amici* write to urge this honorable Court to affirm that role and those protections by recognizing the government's ability to acknowledge and accommodate religion through monuments such as the one in Alabama.

Amici submit that this case raises such crucial issues regarding religion's role in society that Respondents' decision to waive response to the petition should not foreclose participation by interested *Amici*. *Amici* respectfully request leave to file this brief.

Jordan W. Lorence
Counsel of Record for *Amici Curiae*

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INTEREST OF AMICI[1]

Coral Ridge Ministries ("Coral Ridge") is a non-profit organization that exists to inform, equip, and support Christians; enabling them to defend and implement the Biblical principles on which our country was founded. Coral Ridge was established by Dr. D. James Kennedy to provide non-partisan, non-denominational information, training, and support to all those interested in positively affecting the culture and renewing the vision of our Founding Fathers as expressed in America's founding documents. Coral Ridge is a national grassroots organization with participants in all fifty states.

Coral Ridge supports Alabama Chief Justice Roy S. Moore, and his efforts to acknowledge the important role the Ten Commandments play in this country's legal system. The Eleventh Circuit specifically noted the supportive role Coral Ridge played for the Chief Justice in this litigation. *Glassroth v. Moore*, 335 F.3d 1282, 1286 (11th Cir. 2003) (hereinafter, "*Glassroth II*"). The district court, too, found Coral Ridge's involvement extremely significant and mentioned the ministry prominently throughout its decision. *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1294, 1303, 1304 n.2, 1316-17 (M.D. Ala. 2002) (hereinafter, "*Glassroth I*").

Focus on the Family ("Focus") is a nonprofit organization founded by James C. Dobson, PhD an internationally recognized expert on the family. Dr. Dobson is well known through his syndicated radio programs heard daily on more than three thousand radio stations in twelve languages in

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[1] No portion of this brief was authored by counsel for a party and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

more than ninety-five countries. Focus is dedicated to strengthening the family as one of the foundational institutions of civilization.

Family Research Council ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. FRC provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

Amici believe that the government may lawfully acknowledge the major role religious principles have served in forming our legal system and liberties. Specifically, the Ten Commandments monument displayed by Alabama Supreme Court Chief Justice Roy S. Moore exemplifies lawful acknowledgment. *Amici* believe that banning such displays affirmatively denies the historical facts of our religious heritage as a nation.

SUMMARY OF THE ARGUMENT

This Court should address the constitutional principles for government displays of monuments with religious messages. In addition to the present case, there are no fewer than fifteen Ten Commandments monument cases pending before the federal courts. *See* Appendix A (listing active federal Ten Commandments cases). The issues presented in these cases go to the heart of whether government may acknowledge God's role in human affairs—just as the Framers clearly did—with passive monuments or displays.

The decision below illustrates why the *Lemon* test is unworkable and should be discarded. *Lemon* has led courts to delve into detailed inquiries about the personal beliefs of government officials, as did the court below. Such a result creates a new form of religious test. In order to survive constitutional scrutiny, religious monuments must either be

"grandfathered in," by virtue of their age, or found to be completely lacking any religious significance. Such a result is inconsistent with the history of the First Amendment.

This Court should abandon the *Lemon* test in favor of the formal coercion test endorsed by four members of this Court in *Lee v. Weisman,* 505 U.S. 577, 640 (1992). The Establishment Clause, viewed through lens of our nation's history and tradition, is a protection against coerced belief or action and the establishment of a national church. It was not intended to prohibit the government's ability to acknowledge God and the importance of religion to the founding of our country. This Court should resolve the continuing conflict and confusion surrounding the Establishment Clause by giving clear guidance to lower courts deciding cases involving religious displays in a way consistent with the history and purpose of the Establishment Clause.

This Court also should address the lack of Article III standing of most plaintiffs who challenge the constitutionality of religious monuments. Typically, the plaintiffs in these cases lack any concrete injury. For example, the court below allowed mere emotional reactions, combined with self-inflicted and pretextual economic burdens, to confer standing on Plaintiffs. In so doing, the court below disregarded this Court's clear holding in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

ARGUMENT

I. THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL PRINCIPLES FOR RELIGIOUS MONUMENTS

The law surrounding governmental display of the Ten Commandments is far from settled and this Court should address it. No fewer than fifteen cases regarding the issue

are pending in federal courts. *See* Appendix A (listing active federal Ten Commandments cases). Clearly, litigation over these displays involves important issues pertinent to Americans today, and vital to the national identity.[2] As the Third Circuit Court of Appeals has observed: "The uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3d Cir. 1997).

This Court has granted certiorari to a Ten Commandments dispute only once, and then only within the fact-specific context of Kentucky's public schools. *Stone v. Graham*, 449 U.S. 39 (1980). Since May of this year alone, three federal appellate courts have published opinions in Ten Commandments display cases.[3] Meanwhile, seven Ten Commandments cases are pending before the Third,[4] Fifth,[5]

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[2] As of September 2003, 77% of Americans favored public display of the Ten Commandments. *See* The Gallup Organization, *Americans Approve of Public Displays of Religious Symbols* (October 3, 2003), *at* http://www.gallup.com/poll/releases/pr031003.asp ("Seven in 10 Americans approve of the display of a Ten Commandments monument in a public area, an attitude at odds with a federal judge's recent order to remove such a monument from an Alabama courthouse.").

[3] The other two are *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003), *reh'g denied*, No. 02-14146 (11th Cir. August 6, 2003) and *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003), *reh'g denied*, No. 02-1765 (3d Cir. August 11, 2003).

[4] *Modrovich v. County of Allegheny*, No. 03-3571 (3rd Cir. filed August 28, 2003).

[5] *Van Orden v. Perry*, No. 02-51184 (5th Cir. filed October 31, 2002).

Sixth,[6] and Eighth[7] circuits.

Finally, the Third Circuit,[8] the Tenth Circuit,[9] the Eleventh Circuit,[10] and the Colorado Supreme Court[11] have all upheld various forms of Ten Commandments displays as consistent with the Establishment Clause. The panel decision in *Glassroth II* conflicts with these decisions. Without this Court's guidance, future decisions will only perpetuate the existing confusion.

II. THIS COURT SHOULD ABANDON THE *LEMON* TEST

Seldom has a decision by this Court been so criticized as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 Cal. L. Rev. 5, 6 (1987) ("It is fair to say that subsequent decisions [since *Lemon*] have produced a conceptual disaster area."). Although a majority of the

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[6] There are four cases pending before the Sixth Circuit alone. *ACLU of Kentucky v. McCreary County*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU of Ohio v. Ashbrook*, No. 02-3667 (6th Cir. filed June 17, 2002); *Baker v. Adams County*, No. 02-3777 (6th Cir. filed July 11, 2002); *ACLU of Kentucky v. Mercer County*, No. 03-5142 (6th Cir. filed February 3, 2003).

[7] *ACLU of Nebraska v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D.Neb. 2002).

[8] *Freethought Soc'y*, 334 F.3d at 247 (upholding constitutionality of Ten Commandments plaque on county courthouse).

[9] *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1975), *cert. denied* 414 U.S. 879 (1973) (upholding constitutionality of illuminated display of Ten Commandments on courthouse grounds).

[10] *King*, 331 F.3d at 1271 (Affirming constitutionality of city clerk's seal containing Ten Commandments).

[11] *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996) (upholding constitutionality of Ten Commandments display on state property).

members of this Court have expressed disdain for the test, *Lemon* remains alive and well. *See, e.g., Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 2708 (2000) (citing instances in which Scalia, J., Thomas, J., Kennedy, J., O'Connor, J., and Rehnquist, C.J. expressed disapproval of *Lemon*).

This Court has declined to apply or even mention *Lemon* in several important Establishment Clause cases. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lee v. Weisman*, 505 U.S. 577; *Marsh v. Chambers*, 463 U.S. 783 (1983). Other tests have emerged, but none has conclusively supplanted *Lemon*.[12]

Unfortunately, the decision to sacrifice "clarity and predictability for flexibility," *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980), has had the effect of also sacrificing individual religious rights and the government's ability to recognize the important role of religion, its tenets and teachings, and its basis for law and civil order in our society. Simply put, the *Lemon* test is at odds with Justice Douglas's famous observation in *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952): "We are a religious people whose institutions presuppose a Supreme Being."

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[12] This Court has varied its Establishment Clause jurisprudence by introducing the "endorsement test," *Lynch v. Donnelly*, 465 U.S. 668 (1984), the "psychological coercion test," *Lee v. Weisman*, 505 U.S. 577 (1992), the "neutrality test," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), and the "historical test," *Marsh v. Chanbers*, 463 U.S. 783 (1983).

A. *Lemon* Provides Inadequate Guidance For The Lower Courts

The *Lemon* test has been so disparaged by members of this Court that lower courts routinely cite criticism of the test before applying it. *See, e.g., Glassroth II*, 335 F.3d at 1295 (making the "obligatory observation that the *Lemon* test is often maligned"). Several circuits have pled for a more precise and predictable test for deciding Establishment Clause cases. *See, e.g., Barnes v. Cavazos,* 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon's* analytical framework."); *City of Zion v. City of Rolling Meadows,* 927 F.2d 1401, 1419 (7th Cir. 1991) ("Applying *Lemon* . . . to religious symbols on city seals is no cakewalk. *Lemon's* 'three-part test' is not a test. It is a triad of questions, the answers to which conflict in all interesting cases."); *Rusk v. Crestview Local Schs.,* 220 F.Supp.2d 854, 856-57 (N.D. Ohio 2002) ("The *Lemon* test has attracted criticism due to the lack of explicit language and confusion in applying it to specific scenarios.").

B. *Lemon* Leads To Disparate Results

Application of *Lemon's* three part inquiry ("secular legislative purpose"; "primary effect" that "neither advances nor inhibits religion"; and absence of "excessive government entanglement with religion" 403 U.S. at 612-613)[13] has proven entirely problematic, particularly in the religious display context. In recent years alone, a number of lower courts have utilized different approaches to *Lemon's* purpose

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[13] Neither court below ruled on the basis of *Lemon's* excessive entanglement prong.

and effect prongs, leading to inconsistent results. These disparate approaches do not create a clear understanding of the requirements of the First Amendment. On the contrary, "they inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Bagett v. Bullitt,* 377 U.S. 360, 372 (1964)). The nation's religious observance should not be chilled by an unsure jurisprudence.

1. Purpose Prong

Application of the secular purpose prong among the circuits has yielded varying results. Chief Justice Rehnquist has criticized the secular purpose prong as "mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. . . ." *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, C.J., dissenting).

This Court has stated that "a secular purpose" will satisfy *Lemon's* purpose prong even if there is a religious aspect to the government action at issue. *Lynch*, 465 U.S. at 681 n.6 ("The City contends that the purposes of the display are 'exclusively secular.' We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires.").

The Eleventh Circuit in *Glassroth II* inverted the purpose test. In an approach summarily affirmed by the Eleventh Circuit, the district court below treated **any** religious purpose as a *per se* violation of the *Lemon* test. Although there was strong evidence of a secular purpose in the record,[14] the

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[14] *See Glassroth I*, 229 F.Supp.2d at 1300 ("Experts on both sides testified that the Ten Commandments were a foundation of American law, that America's

Footnotes continued to next page.

district court found that a secular purpose was lacking because Chief Justice Moore actually believes in the importance of the Ten Commandments. *Glassroth I*, 229 F.Supp.2d at 1296. In essence, the Eleventh Circuit ruled that the Chief Justice's beliefs invalidate the legitimate secular purpose for the monument because he sees the monument as more than a "sort of secular moral code." *Id.*

The Eleventh Circuit applies the "secular purpose prong" of *Lemon* as a new form of religious test. When a governmental official actually believes that individual rights ultimately derive from God—as the Declaration of Independence clearly states—then any act of religious symbolism acknowledging that fact will violate the Establishment Clause, even if legitimate secular reasons for the display clearly exist. Such parsing of motive and purpose flies in the face of our Nation's history and tradition, and should not be sanctioned in the name of the First Amendment.

2. Effects Prong

The effects prong of *Lemon* is so malleable that lower courts have conflated the effects analysis with the "endorsement test." Both tests inquire as to what a reasonable observer would perceive as government endorsement of religion. *See generally*, *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (Justices O'Connor and Stevens detail different versions of the reasonable observer under the endorsement test). Scholars have criticized the second prong of *Lemon* as vague, nebulous, subjective, and almost impossible to apply.

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founders looked to and relied on the Ten Commandments as a source of absolute moral standards.").

See Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. Det. Mercy L. Rev. 113, 163 (1992).

The unpredictability in the Circuits from *Lemon's* "effects" prong is well illustrated by comparing the present case to the Third Circuit's *Freethought Society* decision. The court below upheld findings that nothing in the history or physical characteristics of the monument would mitigate the impression of a reasonable observer that the State of Alabama was endorsing Christianity. *Glassroth I*, 229 F.Supp.2d at 1304. In contrast, the appellate court in *Freethought Society* upheld a Ten Commandments monument, 334 F.3d at 266-67, even though the district court found it to be large, prominent, and unique, *Freethought Soc'y v. Chester County*, 191 F.Supp.2d 589, 598 (E.D. Pa. 2002), *rev'd Freethought Soc'y*, 334 F.3d 247.

Simply put, the effects prong gives courts no clear guidance. As the Fifth Circuit noted, "[i]f we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism—and prayer—would fail [the effects prong of *Lemon*]." *Murray v. City of Austin, Texas*, 947 F.2d 147, 154 (5th Cir. 1991). As a result, courts have license to either allow everything or proscribe everything as having the primary effect of advancing or endorsing religion. Such a result contributes to a lack of coherent Establishment Clause jurisprudence.

C. *Lemon* Is Inconsistent With The Establishment Clause's Original Meaning

The inconsistent results produced by *Lemon* are squarely at odds with the true meaning of the Establishment Clause. By design, the Establishment Clause prevented the newly formed federal government from establishing religion at the federal level. *See* Akhil Reed Amar, *The Bill of Rights* 32

(1998); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003).

As Joseph Story, a man with unique insight into the meaning and purpose of the First Amendment,[15] explained:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Joseph Story, *Commentaries on the Constitution of the United States*, § 1868 (1833), *reprinted in* 5 *The Founders' Constitution* 108 (Philip B. Kurland & Ralph Lerner eds. 1987).

"If our history demonstrates anything, it demonstrates that the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (internal

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[15] Joseph Story (1779-1845) was a lawyer, statesman, and jurist who served as a Justice of the United States Supreme Court for thirty-four years. In 1829, he became the first Dane Professor of Law at Harvard University. His *Commentaries on the Constitution of the United States* was one of the most influential legal works of its time, becoming required reading for law students shortly after its publication. *See* Ronald D. Rotunda & John E. Nowak, *Introduction to Joseph Story, Commentaries on the Constitution of the United States*, at v-xiii (reprinted 1987).

quotes omitted). It is ironic that the current Establishment Clause jurisprudence focuses so relentlessly on the secular purpose for government actions concerning religion. Writings of the founding generation unequivocally commend a robust spirituality among the citizenry. For instance, George Washington chose the occasion of his farewell to public life to address the importance of religion to American society:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address*, *in* 4 *Annals of Cong.* 2876 (1796). John Witherspoon, who taught James Madison at Princeton, advised that "to promote religion is the best and most effectual way of making a virtuous and regular people." McConnell, 44 Wm. & Mary L. Rev. at 2196-97 (citing John Witherspoon, *Lectures on Moral Philosophy* 110 (Varnum Collins ed., 1912). Much more recently, Franklin D. Roosevelt observed that the American people "hold to the inspiration of the Old Testament and accept the Ten Commandments as the fundamental law of God." *Quoted in* Stephen L. Carter, *The Culture of Disbelief* 100 (1993). Dwight D. Eishower recognized "[w]ithout God there could be no American form of government, nor an American way of life." *Id.* Likewise, the United States has entered into several international treaties, which invoke the favor of

divine providence.[16]

The push for a revision of the Establishment Clause to a strict separation of church and state is a new phenomenon. At the end of the nineteenth century, proponents of a strict separation—like representative James G. Blaine of Maine—sought to amend the Constitution because they knew that the First Amendment did not "fully guarantee the separation of church and state" they desired. *See* Philip Hamburger, *Separation of Church and State* 296 (2002). The effort to amend the religion clauses reached its zenith in 1875 when President Ulysses S. Grant urged the House and Senate to adopt a constitutional amendment creating a separation of church and state. *Id.* at 322. When the attempts to amend the Constitution failed, proponents of a strict separation focused their attentions on recasting the First Amendment in a new interpretive light. *Id.* at 335-359.

The modern conception of a separation of church and state conflicts with the original understanding of the Establishment Clause. "The notion that the First Amendment was designed to impose a secular political culture on the nation would have struck most 19th Century judges as absurd." *Capitol Square Review*, 243 F.3d at 298. Nonetheless, in 1947 this Court embraced the notion that the Establishment Clause "was intended to erect 'a wall of separation between Church and State.'" *Everson v. Bd. of*

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[16] *See, e.g., The Definitive Treaty of Peace of 1783, in* 26 Journals of the Continental Congress 23 (Worthington C. Ford et al. eds., 1904-37) (beginning "In the name of the most holy and undivided trinity.") (the treaty was signed by John Jay, John Adams, and Benjamin Franklin); *United States Treaty with Morocco Upholding the Light-House at Cape Spartel, May 31, 1865*, 14 *Stat.* 679 ("In the name of the only God! There is no strength nor power but of God."); and *The Gadsen Purchase Treaty, December 30, 1853*, 10 *Stat.* 1031 ("IN THE NAME OF ALMIGHTY GOD").

Educ. of Ewing Township, 330 U.S. 1, 16 (1947). The Establishment Clause was in place for over one-hundred and fifty years before this Court used it to invalidate government action.[17]

As a doctrine, strict separation was urged upon this Court by several radical voices. Archetypical of these is the position taken by the American Civil Liberties Union before this Court: "The purpose of the First Amendment, seen in the perspective of history, is clear enough. It was designed to bring about the complete separation of church and state." Amicus Brief of ACLU in *Everson v. Bd. of Educ.*, *quoted in* Hamburger, *supra* at 458. Such a position as asserted by the ACLU has no basis in fact or history and should be rejected by this Court.

Indeed, the strict separationist approach results in an absurd repudiation of America's heritage. For example, the very document that birthed the United States proffers unmistakably religious justifications for the creation of the American identity: It speaks of the "Laws of Nature and of Nature's God"; asserts the truth that "all men are created equal," and are "endowed by their Creator with certain unalienable Rights"; and "appeals to the Supreme Judge of the world." The Declaration of Independence paras. 1-2, 36 (U.S. 1776). Contrast this candid recognition of God with the conclusion of the district court below: "*the state* may not acknowledge the sovereignty of the Judeo-Christian God and attribute to that God our religious freedom." *Glassroth I*, 229 F.Supp.2d at 1312. One must conclude that the *Lemon* test is flawed when it would invalidate the very words of the Declaration of Independence.

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[17] *See McCollum v. Bd. of Educ.*, 333 U.S. 203, 205 (1948).

III. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A FORMAL COERCION TEST

This Court should abandon the *Lemon* test and realign Establishment Clause jurisprudence to conform more closely to the intent of the Framers of the First Amendment. Specifically, this Court should adopt the formal coercion test discussed by Justice Scalia in *Lee v. Weisman,* 505 U.S. at 631 (Scalia, J., dissenting).

Justice Scalia, speaking for four members of this Court, stated: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 640 (emphasis in the original). *See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

The formal coercion test should be used to scrutinize government actions acknowledging religion. The test should also be applied in a way consistent with historic precedents demonstrating that the Framers of the First Amendment found a certain activity consistent with the Establishment Clause. This Court used that approach when it upheld the practice of paid chaplains praying before the Nebraska Legislature in *Marsh v. Chambers*, 463 U.S. 783, based on the practice of the First Congress which also employed paid chaplains.

The formal coercion test would dovetail with other constitutional provisions protecting an individual's right of conscience to opt out of participation in such events. *See, e.g., West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students with a conscientious objection to saying the Pledge of Allegiance must be excused from a state law requirement to recite it in public school). Additionally, the formal coercion test would not supplant the neutrality principle expressed in *Widmar v. Vincent*, 454

U.S. 263 (1981) and *Zelman*, 536 U.S. 639 as applied to access by religious groups to government services and funding. *Amici* urge this Court to adopt the formal coercion test to replace the *Lemon* test for deciding Establishment Clause cases.

IV. THE ELEVENTH CIRCUIT IGNORED THIS COURT'S REQUIREMENT OF ARTICLE III STANDING FOR ESTABLISHMENT CLAUSE CHALLENGES

Additionally, the Eleventh Circuit ignored this Court's clear ruling that parties must show actual injury in order to bring an Establishment Clause challenge. *See Valley Forge*, 454 U.S. 464. The jurisdiction of the federal courts is limited to "cases" and "controversies." U.S. Const. art. III, § 1. Among other things, this limitation means that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 476.[18]

The Eleventh Circuit concluded that the Plaintiffs in this litigation—three practicing attorneys—had standing because they were offended by the monument, felt like outsiders, and because some of the Plaintiffs altered their behavior as a result of these feelings. *Glassroth II*, 335 F.3d at 1288, 1292. This finding falls far short of the requirement that a

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[18] Because it deals with the power of federal courts to hear disputes, standing is a threshold issue in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The standing requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). This Court is not bound by its prior decisions where jurisdiction was exercised but not discussed. *U.S. v. L.A. Trucker Truck Lines*, 344 U.S. 33, 38 (1952); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 307 (1962); *and FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1996).

plaintiff must be injured in fact to have standing before the federal courts.[19]

In *Valley Forge* this Court rejected non-economic injury Establishment Clause claims, calling them "unusually broad and novel." 454 U.S. at 470. These claimants lacked standing because:

> They fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-486 (emphasis in original).

While there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *Lee v. Weisman*, 505 U.S. 577, 592 (1992), the Plaintiffs in this case were never subjected to such pressures. They are not impressionable children; they are adult attorneys. Nor were the Plaintiffs in this case subjected to mandatory religious practices such as scriptural readings and recitation of the Lord's Prayer. *See Abington Township v. Schemmp*, 374 U.S. 203, 223 (1963). They merely encountered a stationary monument in the hall of a public building. If the monument had a nonreligious message, the Plaintiffs could not have convinced a court to censor it.

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[19] Three members of this Court have disagreed with a finding of non-economic injury in an Establishment Clause challenge to a religious symbol on public property. *See City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari).

It is insignificant that some of the Plaintiffs in this action voluntarily chose to alter their behavior because of their personal distaste for the monument. *Glassroth II*, 335 F.3d at 1292. Mere psychological injury—utterly ineffective to give standing—cannot become injury when plaintiffs choose to detour around a passive display. There was no basis for the Eleventh Circuit to ignore the rule of *Valley Forge*.

Article III standing is not available to all would-be plaintiffs. "[T]he judicial power requires . . . more for its invocation than important issues and able litigants." *Valley Forge*, 454 U.S. at 489-490. To satisfy Article III, the plaintiffs in this action must prove injury in fact. They cannot do this because they were not injured by the Chief Justice's acknowledgment of God and invocation of historical documents and events; they were simply offended by it. The Establishment Clause does not equip offended observers with blanket vetoes to government action.

CONCLUSION

Amici respectfully request that this Court grant a Writ of Certiorari to: (1) guide the lower courts to decide religious display cases in a manner consistent with the purpose of the Establishment Clause; (2) replace the *Lemon* test with the formal coercion test; and (3) affirm that non-economic injury is insufficient to confer Article III standing.

Respectfully submitted,

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APPENDIX
Pending Ten Commandments Monument Cases

ACLU of Kentucky v. Garrard County, No. 5:01-cv-00481 (E.D. Ky. filed November 27, 2001) (Courthouse "Foundations of American Law and Government" display).

ACLU of Kentucky v. Grayson County, No. 4:01-cv-00202 (W.D. Ky. filed November 27, 2001) (Courthouse "Foundations" display).

ACLU of Kentucky v. McCreary County, No. 01-5935 (6th Cir. filed July 26, 2001) (Courthouse "Foundations" display).

ACLU of Kentucky v. Mercer County, No. 03-5142 (6th Cir. filed February 3, 2003) (Courthouse "Foundations" display).

ACLU of Kentucky v. Rowan County, No. 0:01-cv-00220 (E.D. Ky. filed November 27, 2001) (Courthouse "Foundations" display).

ACLU of Nebraska v. City of Plattsmouth, No. 02-2444 (8th Cir. filed June 5, 2002) (FOE monument in city park.).

ACLU of Ohio v. Ashbrook, No. 02-3667 (6th Cir. filed June 17, 2002) (Courtroom poster).

ACLU of Tennessee v. Rutherford County, No. 3:02-cv-00396 (M.D. Tenn. filed April 18, 2002) (Courthouse "Foundations" display).

Baker v. Adams County, No. 02-3777 (6th Cir. filed July 11, 2002) (School district "Foundations" display).

Books v. Elkhart County, No. 3:03-cv-00233 (N.D. In. filed

March 27, 2003) (County office building historical documents display).

Glassroth v. Moore

Mercier v. City of La Crosse, No. 02-c-0376-c (*remanded to* W.D. Wis. October 22, 2003) (FOE monument on private property within public park).

Modrovich v. County of Allegheny, No. 03-3571 (3rd Cir. filed August 28, 2003) (Courthouse plaque).

Turner v. Habersham County, No. 2:02-cv-00039 (N.D. Ga. filed March 27, 2002) (Courthouse historical documents display).

Van Orden v. Perry, No. 02-51184 (5th Cir. filed 10/31/02) (FOE monument on Capitol lawn).